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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 137

ÆTNA LIFE INSURANCE COMPANY, ETC., ET AL.,
PETITIONERS,

vs.

SAMUEL D. MOSES

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 6, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,834)

(36,834)

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[fols. a-1] [Captions omitted]

[fol. 2]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A CIRCUIT COURT

At Law. No. 77614

ÆTNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Ætna Life Insurance Company, a Corporation, Plaintiffs,

vs.

SAMUEL D. MOSES, an Individual, Defendant

DECLARATION—Filed January 21, 1930

The plaintiffs, Ætna Life Insurance Company, a corporation doing business in the District of Columbia, in its own right, and also to the use of Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, sue the defendant, Samuel D. Moses, for that heretofore, to wit, on the 22nd day of January, 1929, and for some time prior thereto, said Harry M. Bralove was engaged in the erection and construction of certain buildings in the District of Columbia, among others, in the erection and construction of a certain apartment building situated, to wit, at the northeast corner of Connecticut Avenue and Porter Street, Northwest, in the District of Columbia; and for that on, to wit, the 22nd day of January, 1929, and for some time prior thereto, there was in force of law in the District of Columbia a certain act of Congress, being the Act approved May 17, 1928, c. 612, 45 Statutes at Large 600, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other pur-

poses," by which act it was provided, among other things, [fol. 3] that every employer carrying on employment in the District of Columbia should be liable for and should secure the payment to his employees, of compensation for injury or death that might occur to any such employe arising out of and in the course of said employment, and which said act further provided that every employer doing business in the District of Columbia should secure the payment of compensation to his employees, payable under said act, by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund was authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the United States Employees' Compensation Commission, to insure payment of compensation under the Act of May 17, 1928, aforesaid.

And for that, in accordance with the requirements of said Act of Congress, and by reason of his being an employer carrying on employment in the District of Columbia, the plaintiff Harry M. Bralove, on, to wit, the 1st day of July, 1928, applied for and entered into a contract of insurance with plaintiff, Ætna Life Insurance Company, a copy of which said contract (except for the words "Sample Policy" printed thereon) is hereto annexed, marked Exhibit A and prayed to be read and considered as a part hereof as if herein fully set forth, by which said policy of insurance it was agreed, among other things, that plaintiff Ætna Life Insurance Company would promptly pay to any person entitled thereto, under the District of Columbia Workmen's Compensation Act, being the Act of Congress approved May 17, 1928, aforesaid, and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they became due, to such person because of the obligation for compensation for any such injury or death imposed upon plaintiff Harry M. Bralove under the statute aforesaid, and further, to pay for the benefit of plaintiff Harry M. Bralove the proper cost of whatever funeral expenses were required by the provisions of said Act in event of the fatal injury of any employee, the said policy of insurance further providing that plaintiff, Ætna Life Insurance Company, should be subrogated in case of any payment under said policy of insurance, to

[fol. 4] all rights of recovery therefor vested by law either in plaintiff, Harry M. Bralove, or in any employee or his dependents claiming thereunder, against persons, corporations, associations or estates.

And for that, to wit, on the 22nd day of January, 1929, and for some time prior thereto, one Henry Roberts, deceased, was employed by plaintiff Harry M. Bralove as a laborer in and about the construction of the apartment building aforesaid, and in the performance of said employment at the time and place aforesaid was engaged in certain labor requiring his pasage through and along a certain passageway provided for use on, to wit, the ground floor of said apartment building, and was passing through and along said passageway, which said passageway led along and under a certain form or mold used in the pouring of concrete as more fully hereinafter appears.

Plaintiffs further say that, to wit, at the time and place aforesaid, the defendant Samuel D. Moses was a subcontractor under plaintiff Harry M. Bralove, in and about the construction of said apartment building, to wit, for the construction of the concrete and tile work of said apartment building, which said subcontract included the erecting and maintaining of all forms, molds, scaffolds, supports, shores and braces necessary in said concrete and tile work and the construction, use and maintenance of all appliances and tools necessary for said work under the subcontract aforesaid. And plaintiffs say that during and in the course of the performance of the subcontract for concrete and tile work aforesaid, said defendant, his agents, servants and employees did undertake to, and did erect, construct, use and maintain in the apartment building aforesaid a certain form or mold for the pouring of a certain concrete slab.

And plaintiffs say that it then and there became and was the duty of the defendant, his agent, servants and employees, to construct, erect, use and maintain said form or mold, and all scaffolds, supports, shores, braces, appliances and tools appertaining thereto, in a reasonably safe condition and to use reasonable care and prudence in and about the preparing, pouring and finishing of all slabs, columns, piers and beams and to use reasonable care and prudence in and about the performance of the subcontract, aforesaid, so as to keep and save from injury or death [fol. 5] said Henry Roberts, deceased, and other persons

lawfully employed in and about said apartment building. But notwithstanding his said duty in the premises, and wholly disregarding the same, the defendant, his agents, servants and employees, at the time and place aforesaid, did negligently and carelessly erect and construct said form or mold, and the scaffolds, supports, shores, braces, appliances and tools appertaining thereto, of improper and defective materials and of materials insufficient in thickness and strength for the work and purpose required; and did negligently and carelessly erect and use scaffolding, supports, braces, shores, appliances and tools of insufficient length and unsuitable for the work required, and without using reasonable care and diligence in the joining, splicing and securing of said scaffolding, supports, braces, shores, appliances and tools; and did negligently and carelessly erect and use scaffolding, supports, braces, shores, appliances and tools of insufficient length by placing said scaffolding, supports, braces, shores, appliances and tools one upon the other and without using reasonable care and diligence to secure, fasten and brace the same, and without nailing or otherwise securing said scaffolding, supports, braces, appliances and tools to the ribbon strips as in such cases required, and without cross-bracing and fastening said supports, braces, shores, appliances and tools so as to prevent slipping longitudinally or transversely; and did negligently and carelessly erect and use said form or mold and said scaffolding, supports, braces, shores, appliances and tools without securely nailing the same at the places provided therefor, and by the existing conditions required thereat; and negligently and carelessly erected said form or mold and said scaffolding, supports, braces, shores, appliances and tools on uneven and sloping ground and without providing proper bases, foundations or footings known as mud-sills therefor, and on ground unsuitable for the purpose and subject to slippage and movement, and without nailing said scaffolding, supports, braces, shores, appliances and tools to suitable mud-sills or using other and proper means to firmly secure the same; and negligently and carelessly erected said form or mold and said scaffolding, [fol. 6] supports, braces, shores, appliances and tools without having the ribbon pieces necessary thereto properly spliced; and negligently and carelessly erected said form or mold without having the scaffolding, supports, braces,

shores, appliances and tools properly spaced and evenly distributed, but plaintiff avers that said scaffolding, supports, braces, shores, appliances and tools were too far apart and of improper distribution for the work required; and negligently and carelessly erected said form or mold and said scaffolding, supports, braces, shores, appliances and tools in such manner that a failure of one part of said scaffolding, supports, braces, shores, appliances and tools, would cause a failure of all and the collapse of said form or mold, and without protecting said scaffolding, supports, braces, shores, appliances and tools against accidental displacement or breakage; and negligently and carelessly placed said scaffolding, supports, braces, shores, appliances and tools in an improper manner and too close to the certain passageway provided for and used as aforesaid in the transportation of materials used in the construction of said apartment building; and negligently and carelessly erected said form or mold and said scaffolding, supports, braces, shores, appliances and tools without examining or inspecting the same; and negligently and carelessly began the placing of the steel and other materials and the pouring of concrete into said form or mold without examining or inspecting the same, in violation of certain sections of the Building Code of the District of Columbia then and there in force of law, which said sections of said Building Code of the District of Columbia provide as follows:

"Section III.—Precautions and Safeguards

Part 2. Scaffolding.—

A. All scaffolds erected for use in the construction, repair, alteration, or removal of buildings shall be securely and safely supported. They also shall be of sufficient width and properly secured to insure the safety of persons working thereon or passing thereunder or near the same, and to prevent the falling thereof of any materials therefrom. The man in immediate charge of construction or demoli- [fol. 7] tion of a building shall be watchful that the temporary structures shall not be loaded to the danger point. * * *"

"Section VIII.—Structural Engineering Regulations

Part 9. Concrete and Reinforced Concrete.—

* * * * * * *

F. Forms:

1. Forms shall be substantial and sufficiently tight to prevent leakage of mortar; they shall be properly braced or tied together so as to maintain position and shape. * * * Forms and shores shall be inspected during the pouring of the concrete to insure against movement or collapse."

And plaintiffs say that, to wit, at the time and place aforesaid, and by reason of the negligence and carelessness of the defendant, his agents, servants and employees as aforesaid, and while said Henry Roberts, deceased, was engaged in his said employment, and passing along and through the passageway under said form or mold as aforesaid, said form or mold and said scaffolds, supports, shores, braces, appliances and tools collapsed during the pouring of the concrete slab aforesaid, and fell into and upon the aforesaid, and while said Henry Roberts, deceased, was aforesaid, and upon and against the said Henry Roberts, deceased. And plaintiffs further say that by reason of said negligence and carelessness of the defendant, his agents, servants and employees, at the time and place aforesaid, said Henry Roberts, deceased then and there was mangled, maimed and crushed to death.

Plaintiffs further aver that thereafter, upon notice to plaintiff Ætna Life Insurance Company of said injury to and death of the said Henry Roberts, duly given by plaintiff Harry M. Bralove, and upon a claim for compensation filed by said Anna Roberts, widow of said Henry Roberts, deceased, with the United States Employees' Compensation Commission for the District of Columbia, and after hearing upon said claim duly had before the Deputy Commissioner for the District of Columbia of the United States Employees' Compensation Commission aforesaid, and in accordance with the statute in such cases made and provided, it was by said Deputy Commissioner found as a fact [fol. 8] that said Henry Roberts, deceased, to wit, at the time and place aforesaid, was an employee of plaintiff Harry M. Bralove; that the death of said Henry Roberts, deceased, was the result of an injury received in the course of his said employment; that the claimant for compensation for said death was his widow Anna Roberts, within the meaning of the Act of Congress approved May 17, 1928, aforesaid, whereupon said Deputy Commissioner en-

tered an award, a copy of which award is hereto annexed, marked Exhibit B and prayed to be read as a part hereof as if herein fully set forth, requiring plaintiff Harry M. Bralove and plaintiff Ætna Life Insurance Company to pay compensation to the claimant for the death of said Henry Roberts, deceased.

Plaintiff Ætna Life Insurance Company further says that in accordance with said award it has paid and will be required to pay to the person in said award named, the compensation as ordered therein. And plaintiff Ætna Life Insurance Company further says that under the Act of Congress approved May 17, 1928, aforesaid, it was provided that acceptance of compensation in cases where persons other than the employer were liable in damages, should operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, and the employer on account of such assignment might institute proceedings for the recovery of damages. And plaintiff Ætna Life Insurance Company says that as the insurer of Harry M. Bralove under said Act of Congress and by virtue of the express terms of the policy of insurance hereinbefore set forth, it was subrogated to and assigned all rights of plaintiff Harry M. Bralove and persons entitled to compensation aforesaid.

And plaintiffs aver that under the statute aforesaid and by reason of the premises, they have been damaged in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore, and in accordance with the statutes in such cases made and provided, plaintiff Ætna Life Insurance Company in its own right and also to the use of said Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, deceased, and plaintiff Harry M. Bralove to the use of Ætna Life Insurance Company, bring this [fol. 9] suit and claim from said defendant the sum of Ten Thousand Dollars (($10,000.00) besides costs of this suit.

Second Count

The plaintiffs, Ætna Life Insurance Company, a corporation doing business in the District of Columbia, in its own right, and also to the use of Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, de-

ceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, sue the defendant, Samuel D. Moses, for that heretofore, to wit, on the 22nd day of January, 1929, and for some time prior thereto, said Harry M. Bralove was engaged in the erection and construction of certain buildings in the District of Columbia, among others, in the erection and construction of a certain apartment building situated, to wit, at the northeast corner of Connecticut Avenue and Porter Street, Northwest, in the District of Columbia; and for that on, to wit, the 22nd day of January, 1929, and for some time prior thereto, there was in force of law in the District of Columbia a certain act of Congress, being the Act approved May 17, 1928, c. 612, 45 Statutes at Large 600, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes," by which act it was provided, among other things, that every employer carrying on employment in the District of Columbia should be liable for and should secure the payment to his employees, of compensation for injury or death that might occur to any such employee arising out of and in the course of said employment, and which said act further provided that every employer doing business in the District of Columbia should secure the payment of compensation to his employees, payable under said Act, by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund was authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the United States Employees' Compensation Commission, to insure payment of compensation under the Act of May 17, 1928, aforesaid.

[fol. 10] And for that, in accordance with the requirements of said Act of Congress, and by reason of his being an employer carrying on employment in the District of Columbia, the plaintiff Harry M. Bralove, on, to wit, the 1st day of July, 1928, applied for and entered into a contract of insurance with plaintiff, Ætna Life Insurance Company, a copy of which said contract (except for the words "Sample Policy" printed thereon) is hereto annexed, marked Exhibit A, and prayed to be read and considered as a part hereof as if

herein fully set forth, by which said policy of insurance it was agreed, among other things, that plaintiff Ætna Life Insurance Company would promptly pay to any person entitled thereto, under the District of Columbia Workmen's Compensation Act, being the Act of Congress approved May 17, 1928, aforesaid, and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they became due, to such person because of the obligation for compensation for any such injury or death imposed upon plaintiff Harry M. Bralove under the statute aforesaid, and further, to pay for the benefit of plaintiff Harry M. Bralove the proper cost of whatever funeral expenses were required by the provisions of said Act in event of the fatal injury of any employee, the said policy of insurance further providing that plaintiff Ætna Life Insurance Company should be subrogated in case of any payment under said policy of insurance, to all rights of recovery therefor vested by law either in plaintiff Harry M. Bralove, or in any employee or his dependents claiming thereunder, against persons, corporations, associations or estates.

And for that, to wit, on the 22nd day of January, 1929, and for some time prior thereto, one Henry Roberts, deceased, was employed by plaintiff Harry M. Bralove as a laborer in and about the construction of the apartment building aforesaid, and in the performance of said employment at the time and place aforesaid was engaged in certain labor requiring his passage through and along a certain passageway provided for use on, to wit, the ground floor of said apartment building, and was passing through and along said passageway, which said passageway led along and under a [fol. 11] certain form or mold used in the pouring of concrete as more fully hereinafter appears.

Plaintiffs further say that, to wit, at the time and place aforesaid the defendant Samuel D. Moses was a subcontractor under plaintiff Harry M. Bralove, in and about the construction of said apartment building, to wit, for the construction of the concrete and tile work of said apartment building, which said subcontract included the erecting and maintaining of all forms, molds, scaffolds, supports, braces and shores necessary in said concrete and tile work and the construction, use and maintenance of all appliances and tools necessary for said work under the subcontract

aforesaid. And plaintiffs say that during and in the course of the performance of the subcontract for concrete and tile work aforesaid, said defendant, his agents, servants and employees did undertake to, and did erect, construct, use and maintain in the apartment building aforesaid a certain form or mold, and the scaffold, supports, braces, shores, appliances and tools appertaining thereto, necessary in the pouring of a certain concrete slab, said form or mold and said scaffolds, supports, braces, shores, appliances and tools appertaining thereto, being erected by and under the sole control of said defendant.

And plaintiffs say that it then and there became and was the duty of the defendant, his agents, servants and employees, to construct, erect, maintain and use said form or mold and all scaffolds, supports, braces, shores, appliances and tools appertaining thereto in a reasonably safe condition, and to use reasonable care and prudence in and about the preparing, pouring and finishing of all slabs, columns, piers and beams, and to use reasonable care and prudence in and about the performance of the subcontract aforesaid, so as to keep and save from injury or death said Henry Roberts, deceased, and other persons lawfully employed in and about said apartment building. But notwithstanding his said duty in the premises, and wholly disregarding the same, the defendant, his agents, servants and employees, at the time and place aforesaid, so negligently and carelessly erected and constructed said form or mold, and the scaffolds, supports, braces, shores, appliances and tools appertaining thereto, that said form or mold, and said scaffolds, [fol. 12] supports, braces, shores, appliances and tools appertaining thereto, and the cement and materials therein contained, collapsed during the pouring of the concrete slab in said form or mold, and fell into and upon the passageway used by said Henry Roberts, deceased, as aforesaid, and upon and against the said Henry Roberts, deceased, while said Henry Roberts, deceased, was engaged in his said employment, and passing along and through the passageway under said form or mold as aforesaid. Whereby and by reason of the negligence and carelessness of the defendant, his agents, servants and employees, at the time and place aforesaid, said Henry Roberts, deceased, then and there was mangled, maimed and crushed to death.

Plaintiffs further aver that thereafter, upon notice to plaintiff Ætna Lige Insurance Company of said injury to and death of the said Henry Roberts, duly given by plaintiff Harry M. Bralove, and upon a claim for compensation filed by said Anna Roberts, widow of said Henry Roberts, deceased, with the United States Employees' Compensation Commission for the District of Columbia, and after hearing upon said claim duly had before the Deputy Commissioner for the District of Columbia of the United States Employees' Compensation Commission aforesaid, and in accordance with the statute in such cases made and provided, it was by said Deputy Commissioner found as a fact that said Henry Roberts, deceased, to wit, at the time and place aforesaid, was an employee of plaintiff Harry M. Bralove; that the death of said Henry Roberts, deceased, was the result of an injury received in the course of his said employment; that the claimant for compensation for said death was his widow Anna Roberts, within the meaning of the Act of Congress approved May 17, 1928, aforesaid, whereupon said Deputy Commissioner entered an award, a copy of which award is hereto annexed, marked Exhibit B and prayed to be read as a part hereof as if herein fully set forth, requiring plaintiff Harry M. Bralove and plaintiff Ætna Life Insurance Company to pay compensation to the claimant for the death of said Henry Roberts, deceased.

Plaintiff Ætna Life Insurance Company further says that in accordance with said award it has paid and will be [fol. 13] required to pay to the person in said award named, the compensation as ordered therein. And plaintiff Ætna Life Insurance Company further says that under the Act of Congress approved May 17, 1928, aforesaid, it was provided that acceptance of compensation in cases where persons other than the employer were liable in damages, should operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, and the employer on account of such assignment might institute proceedings for the recovery of damages. And plaintiff Ætna Life Insurance Company says that as the insurer of Harry M. Bralove under said Act of Congress and by virtue of the express terms of the policy of insurance hereinbefore set forth, it

was subrogated to and assigned all rights of plaintiff Harry M. Bralove and persons entitled to compensation aforesaid.

And plaintiffs aver that under the statute aforesaid and by reason of the premises, they have been damaged in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore, and in accordance with the statutes in such cases made and provided, plaintiff Ætna Life Insurance Company in its own right and also to the use of said Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, deceased, and plaintiff Harry M. Bralove to the use of Ætna Life Insurance Company, bring this suit and claim from said defendant the sum of Ten Thousand Dollars ($10,000.00) besides costs of this suit.

Chas. W. Arth, Leonard J. Ganse, Attorneys for Plaintiffs.

(Here follows Exhibit A, marked page 13a)

ÆTNA
LIFE INSURANCE COMPANY

ACCIDENT AND LIABILITY DEPARTMENT

HARTFORD, CONNECTICUT, (HEREIN CALLED THE COMPANY)

Does Hereby Agree with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows:

COMPENSATION. **One (a) To Pay Promptly** to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due,

(1) To such person because of the obligation for compensation for any such injury imposed upon or accepted by this Employer under such of certain statutes, as may be applicable thereto, cited and described in an endorsement attached to this Policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this Policy, while this Policy shall remain in force. Nothing herein contained shall operate to so extend this Policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached.

LIABILITY. **One (b) To Indemnify** this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada. In the event of the bankruptcy or insolvency of this Employer the Company shall not be relieved from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency, an execution against this Employer is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person claiming by, through or under the injured, against the Company under the terms of this Policy for the amount of the judgment in said action not exceeding the amount of this Policy.

SERVICE. **Two To Serve** this Employer **(a)** by the inspection of work places covered by the Policy when and as deemed desirable by the Company and thereupon to suggest to this Employer such changes or improvements as may operate to reduce the number or severity of injuries during work, and, **(b)** upon notice of such injuries, by investigation thereof and by settlement of any resulting claims in accordance with law.

DEFENSE. **Three To Defend,** in the name and on behalf of this Employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent.

COST AND EXPENSES. **Four To Pay** all costs taxed against this Employer in any legal proceeding defended by the Company, all interest accruing after entry of judgment and all expenses incurred by the Company for investigation, negotiation or defense.

EMPLOYEES COVERED. **Five This agreement shall apply** to such injuries sustained by any person or persons employed by this Employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this Policy is to be computed and adjusted, and, also to such injuries so sustained by the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation. The remuneration of any such designated officer shall not be subjected to a premium charge unless he is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman.

BUSINESS COVERED. **Six This agreement shall apply** to such injuries so sustained by reason of the business operations described in said Declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said Declarations or elsewhere in connection with, or in relation to, such work places.

POLICY TERM. **Seven This agreement shall apply only** to such injuries as are sustained by reason of accidents occurring during the Policy Period limited and defined as such in Item 2 of said Declarations.

This Agreement is subject to the following Conditions:

BASIS OF

SPECIMEN POLICY

or connected therewith, whether such operations are conducted at the work places defined and described in said Declarations or elsewhere in connection with, or in relation to, such work places.

POLICY TERM. Seven This agreement shall apply only to such injuries as sustained by reason of accidents occurring during the Policy Period limited and defined as such in Item 2 of said Declarations.

SAMPLE

This Agreement is subject to the following Conditions:

BASIS OF PREMIUM. A—The premium is based upon the entire remuneration earned, during the Policy Period, by all employees of this Employer engaged in the business operations described in said Declarations together with all operations necessary, incident or appurtenant thereto, or connected therewith whether conducted at such work places or elsewhere in connection therewith or in relation thereto; excepting however the remuneration of the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation, but including the remuneration of any one or more of such designated officers who are actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. If any operations as above defined are undertaken by this Employer but are not described or rated in said Declarations, this Employer agrees to pay the premium thereon, at the time of the final adjustment of the premium in accordance with Condition C hereof, at the rates, and in compliance with the rules, of the Manual of Rates in use by the Company upon the date of issue of this Policy. At the end of the Policy Period the actual amount of the remuneration earned by employees during such Period shall be exhibited to the Company, as provided in Condition C hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium, thus computed, is greater than the advance premium paid, this Employer shall immediately pay the additional amount to the Company, if less, the Company shall return to this Employer the unearned portion, but in any event the Company shall retain the Minimum Premium stated in said Declarations. All premiums provided by this Policy, or by any endorsement hereon, shall be fully earned whether any such Workmen's Compensation Law, or any part of such, is now or shall hereafter be declared invalid or unconstitutional.

CANCELLATION. B—This Policy may be cancelled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the Policy Period. The law of any state, in which this Policy applies, which requires that notice of cancellation shall be given to any Board, Commission or other state agency is hereby made a part of this Policy and cancellation in such state shall not be effective except in compliance with such law. The remuneration of employees for the Policy Period stated in said Declarations shall be computed upon the basis of the actual remuneration to the date of cancellation determined as herein provided. If such cancellation is at the Company's request, the earned premium shall be adjusted pro rata as provided in Condition A. If such cancellation is at this Employer's request, the earned premium shall be computed and adjusted at short rates, in accordance with the table printed hereon, but such short rate premium shall not be less than the Minimum Premium stated in said Declarations. If this Employer when requesting cancellation is actually retiring from the business herein described, then the earned premium shall be computed and adjusted pro rata. Notice of cancellation shall be served upon this Employer as the law requires, but, if no different requirement, notice mailed to the address of this Employer herein given shall be a sufficient notice, and the check of the Company, similarly mailed, a sufficient tender of any unearned premium.

INSPECTION AND AUDIT. C—The Company shall be permitted, at all reasonable times during the Policy Period, to inspect the plants, works, machinery, and appliances covered by this Policy, and to examine this Employer's books at any time during the Policy Period, and any extension thereof, and within one year after its final expiration, so far as they relate to the remuneration earned by any employees of this Employer while this Policy was in force.

COMPANY'S OBLIGATIONS. D—The obligations of Paragraph One (a) foregoing are hereby declared to be the direct obligations and promises of the Company to any injured employee covered hereby, or, in the event of his death, to his dependents; and to each such employee or such dependent the Company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the Company, but any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or pro-

(7735)

ceedings are brought against the Company alone or jointly with this Employer. If the law of any state in which the Policy is applicable provides for the enforcement of the rights of such employees or such dependents by any Commission, Board or other state agency for the benefit of such employees or such dependents, then the provisions of such law are made a part hereof, as respects any matter subject thereto, as fully as if written herein. The obligations and promises of the Company as set forth in this paragraph shall not be affected by the failure of this Employer to do or refrain from doing any act required by the Policy; nor by any default of this Employer after the accident in the payment of premiums or in the giving of any notice required by the Policy or otherwise; nor by the death, insolvency, bankruptcy, legal incapacity or inability of this Employer, nor by any proceeding against him as a result of which the conduct of this Employer's business may be and continue to be in charge of an executor, administrator, receiver, trustee, assignee, or other person.

KNOWLEDGE AND JURISDICTION. E—As between the employee and the Company, notice to or knowledge of this Employer of an injury or death covered hereby shall be notice or knowledge as the case may be of the Company; the jurisdiction of this Employer for the purposes of any Workmen's Compensation Law covered hereby shall be jurisdiction of the Company and the Company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions rendered against this Employer in the form and manner provided by such laws and within the terms, limitations and provisions of this Policy not inconsistent with such laws.

REPORTING ACCIDENTS CLAIMS AND SUITS. F—This Employer, upon the occurrence of an accident, shall give immediate written notice thereof to the Company with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If, thereafter, any suit or other proceeding is instituted against this Employer he shall immediately forward to the Company every summons, notice or other process served upon him. Nothing elsewhere contained in this Policy shall relieve this Employer of his obligations to the Company with respect to notice as herein imposed upon him.

ASSURED'S RIGHT OF RECOVERY. G—No action shall lie against the Company to recover upon any claim or for any loss under Paragraph One (b) foregoing unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this Employer after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years thereafter.

STATUTORY PROVISIONS AFFECTING NOTICES. H—If the method of serving notice of cancellation, or the limit of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which any of the business operations herein described are conducted, such specific statutory provision shall supersede any such condition in this contract inconsistent therewith.

CHANGE OF INTEREST. I—No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

CONCURRENT INSURANCE. J—If this Employer carries any other insurance covering a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectible insurance.

SUBROGATION OF RIGHTS. K—The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates.

ALTERATIONS IN POLICY. L—No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary, or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein. The personal pronoun herein used to refer to this Employer or to an injured employee or dependents, shall apply regardless of number or gender.

DECLARATIONS. M—The statements in Items 1 to 7, inclusive, in the Declarations hereinafter contained, are true; those stated as estimates only are believed to be true. This Policy is issued upon such statements and in consideration of the provisions of the Policy respecting its premium and the payment of the premium in such Declarations expressed.

In Witness Whereof, The Ætna Life Insurance Company *has caused this Policy to be signed by its President and Secretary and countersigned by a duly authorized agent of the Company.*

SAMPLE POLICY

Secretary.

SAMPLE POLICY

President.

Countersigned by

A. J. VOORHEES, Manager

By Frank O. Smith Attorney *General Agent—Manager.*

This space is intended for the attachment of such endorsements as may be executed as in the Policy provided, and, when so executed and attached, they are to be construed as a part of the Policy.

The agent shall see that this request for assignment is properly executed in case of change of interest and shall attach to this policy properly executed endorsement of approval.

.....*19*

FOR VALUE RECEIVED, and subject to the consent of the ÆTNA LIFE INSURANCE COMPANY, the interest of the Assured in this Policy is hereby assigned to .....,

of .....,
(State street, number, and town.)

a .....
(State whether individual, estate, co-partnership or corporation, and if a corporation name State in which incorporated; if a co-partnership give the name of each member thereof.)

.....
(Signature of Assured.)

Standard Workmen's Compensation and Employers' Liability Policy.

C. 069053

The agent shall see that this request for assignment is properly executed in case of change of interest and shall attach to this policy properly executed endorsement of approval.

.....*19*

FOR VALUE RECEIVED, and subject to the consent of the ÆTNA LIFE INSURANCE COMPANY, the interest of the Assured in this Policy is hereby assigned to .....,

of .....,
(State street, number, and town.)

a .....
(State whether individual, estate, co-partnership or corporation, and if a corporation name State in which incorporated; if a co-partnership give the name of each member thereof.)

.....
(Signature of Assured.)

SHORT RATE CANCELLATION TABLE

FOR TERM OF ONE YEAR.

	PER CENT. OF ANNUAL PREMIUM
1 day	2
2 days	4
3 "	5
4 "	6
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .

NOTICE.

DON'T fail to notify the Home Office of the Company at Hartford, Conn., or its duly authorized agent, of EVERY ACCIDENT HOWEVER SLIGHT, IMMEDIATELY upon its occurrence.

If accident is fatal or involves SERIOUS INJURY, TELEGRAPH or TELEPHONE at Company's expense, giving date of inquest if one is to be held.

DO NOT DELAY sending in notice because unable to give all the information desired, send a completed notice later.

Standard Workmen's Compensation and Employers' Liability Policy.

C. 069035

ACCIDENT AND LIABILITY DEPARTMENT

ISSUED TO

HARRY M. BRALOVE

Expires July 1, 1929

STANDARD WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY
Form 7735

SHORT RATE CANCELLATION TABLE

FOR TERM OF ONE YEAR.

		PER CENT. OF ANNUAL PREMIUM
1	day	2
2	days	4
3	"	5
4	"	6
5	"	7
6	"	8
7	"	9
8	"	9
9	"	10
10	"	10
11	"	11
12	"	12
13	"	13
14	"	13
15	"	14
16	"	14
17	"	15
18	"	16
19	"	16
20	"	17
25	"	19
30	"	20
35	"	23
40	"	26
45	"	27
50	"	28
55	"	29
60	"	30
65	"	33
70	"	36
75	"	37
80	"	38
85	"	39
90	" or three months	40
105	"	45
120	" or four months	50
135	"	55
150	" or five months	60
165	"	65
180	" or six months	70
195	"	73
210	" or seven months	75
225	"	78
240	" or eight months	80
255	"	83
270	" or nine months	85
285	"	88
300	" or ten months	90
315	"	93
330	" or eleven months	95
360	" or twelve months	100

Endorsement No. 3

It is understood and agreed that Item 1 of the Declarations of this policy is hereby amended to read as follows:

"Item 1. Name of this Employer - Harry M. Bralove and Broadmore Corp.

P. O. Address - 1106 Vermont Avenue, N. W., Washington, D. C.

Individual, co-partnership, corporation or estate? (1) Individual
(2) Corporation

instead of as originally written.

This endorsement when countersigned by a duly authorized General Agent of the Company, or Manager of one of the Company's Branch Offices, or by the lawful Attorney in fact of such General Agent or Manager, and attached to Policy No. C-069033 issued to Harry M. Bralove and Broadmore Corp. of Washington, D. C. shall be valid, and shall form a part of said Policy.

Ætna Life Insurance Company,
Accident and Liability Department,

E C Higgins
Secretary.

Countersigned at Washington, D. C.

this 1st day of January, 1929

by R Jones
Authorized General Agent or Manager.

1-14-29 MHP

FORM 7527-B

ENDORSEMENT.

ADDITIONAL OPERATIONS.

In consideration of an additional premium of $47.20 based on an estimated payroll of
It is hereby understood and agreed that from July 1, 1928 $4000.00

this Policy, subject to its terms, conditions and agreements, covers Building - operation (Owner or lessee) all employees engaged in care, custody and maintenance of premises, the operation of elevators heating, lighting and power apparatus; excluding extraordinary additions, alterations or repairs and the operation and maintenance of amusement devices. (Code 9015)

Location of building - 3901 Connecticut Avenue, N. W., Washington, D. C.

It is further agreed that the Assured will keep a separate record of the actual wages expended in the prosecution of the work above described, and will pay a premium thereon computed at a rate of 1.18
for each One Hundred Dollars ($100.00) thereof.

Attached to and forming part of Policy No. C-069033, *dated* July 1, 1928,
issued by the **Ætna Life Insurance Company,** *Accident and Liability Department, of Hartford, Conn.,*
to Harry M. Bralove,

July 1, *19* 28.

E C Higgins
Secretary.

Form 5038-A

10-17-28 MEP

DISTRICT OF COLUMBIA COMPENSATION LAW

The obligations of *Paragraph One* (*a*) of the Policy include the District of Columbia Workmen's Compensation Act, being Public Act No. 419 of the 70th Congress, approved May 17, 1928, and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, being Public Act No. 803 of the 69th Congress, and all laws amendatory of either of said Acts or supplementary thereto which may be or become effective while this Policy is in force.

The Company will carry out the provisions of Section 35 of the Longshoremen's and Harbor Workers' Compensation Act, made applicable by said Public Act No. 419 of the 70th Congress. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the Policy.

The Company agrees to abide by all the provisions of said District of Columbia Workmen's Compensation Act and all lawful rules, regulations, orders, and decisions of the United States Employees' Compensation Commission and of the deputy commissioner for the District of Columbia having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

This endorsement shall not be cancelled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Deputy Commissioner for the District of Columbia, and to this Employer.

References to the law of any State in Conditions B and D of this Policy are hereby declared to include, for the purposes of this endorsement only, the provisions of the District of Columbia Workmen's Compensation Act.

If this Employer is a contractor the subject of whose contract includes operations covered by this Policy and he shall sub-contract all or any part of such contract to one or more sub-contractors, the remuneration of all the direct employees of all such sub-contractors shall be included in the return of remuneration under the provisions of this Policy upon which premium is computed. Such remuneration so reported shall be considered the remuneration of employees of this Employer and shall in all instances be governed by the same terms, conditions, requirements, and obligations of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply as respects any such sub-contractor who has secured compensation for his direct employees as required by the District of Columbia Workmen's Compensation Act, but this Employer shall not claim the benefit of this exemption unless and until he shall satisfy the Company by certificate or otherwise that any such sub-contractor has legally secured the payment of compensation to his own direct employees and then only respecting any sub-contractor who has furnished such proof.

If this Employer is a corporation, the entire remuneration of the President, any Vice-President, Secretary or Treasurer shall be disclosed and made subject to a premium charge at the rate applicable to the hazard to which each such officer is exposed, which rate shall be applied to the actual remuneration of each such officer but not in excess of $100 per week. If any such officer is exposed to varying hazards, premium shall be charged on the basis of the highest rate for any hazard to which he is exposed.

If the premium as determined in accordance with the provisions of the Policy is less than $300, there shall be added thereto an Expense Constant of $10, unless such addition shall increase the premium to an amount in excess of $300, in which event only such part of the Expense Constant shall be added as will bring the amount of the premium up to $300. Inclusion of the Expense Constant or any part thereof in the Estimated Advance Premium is subject to final adjustment upon audit, all in accordance with the provisions hereof. The Minimum Premium of the Policy includes the Expense Constant

Forming part of the Policy to which it is attached from its date of issue.

ÆTNA LIFE INSURANCE COMPANY, Accident and Liability Department, of Hartford, Conn.

E C Higgins

DECLARATIONS.

Attached to and forming part of Policy No. C -069053

Item 1. Name of this Employer Harry M. Bralove

P. O. Address 1106 Vermont Avenue, N. W., Washington, D. C.

For the purpose of serving notice, as in the Policy provided, this Employer agrees that this address may be considered as both the residence and business address of this Employer or any representative upon whom notice may be served.

Individual, co-partnership, corporation or estate? Individual

Item 2. The period during which the Policy shall remain in force, unless cancelled as in the Policy provided, (herein called the Policy Period) shall be from July 1, 19 28, to July 1, 19 29, at twelve and one minute o'clock A. M., standard time, as to each of said dates at the place where any operation covered hereby is conducted, as respects that operation, or at the place where any injury covered hereby is sustained, as respects that injury.

Item 3. Location of all factories, shops, yards, buildings, premises or other workplaces of this Employer, by Town or City, with Street and Number 1106 Vermont Avenue, N. W., Washington, D. C. and elsewhere in the District of Columbia.

All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following Divisions as are undertaken by this Employer. 1 All industrial operations upon the premises. 2 All office forces. 3 All repairs or alterations to premises. 4 Specially rated operations on the premises. 5 Operations not on the premises.

CLASSIFICATION OF OPERATIONS (NOTE: If more than one classification indicate each other by (b), (c), (d), etc.)	Estimated Total Annual Remuneration	Rate per $100. of Remuneration	Estimated Premium		
1 (a) Carpentry - installation of interior trim, builders' finish or cabinet work	$50,000.	1.30	650	00	
(x) President, any Vice-President, Secretary or Treasurer of corporate Employer who performs duties of Superintendent, Foreman or Workman.	none				
2 (a) Clerical Office Employees	6,000.	.05	3	00	
(b) Draughtsmen (engaged exclusively in the profession) — office duties only.	none				
3 New construction work by employees of this Employer only, classified as					
Note: Appropriate classifications must be entered above with estimated remuneration, rate and premium extension in each. Not available for contractors. Repairs and maintenance of this Employer's buildings and equipment when accomplished by his employees only are included in Division 1. New construction, repairs, and maintenance undertaken by contractors must be separately insured.	none				
4	none				
5 (a) Erection, installation, repair or demonstration of Employer's product as follows:	none				
(b) Outside Salesmen, collectors and messengers (wherever engaged) who do not deliver merchandise	none				
(c) Drivers and their Helpers, including stablemen — if not specifically included in Division 1.	none				
(d) Chauffeurs and their Helpers — Commercial, including incidental garage employees — if not specifically included in Division 1.	none				
Minimum Premium for this Policy shall be $30.00		Estimated Advance Premium	653	00	

Item 4. The foregoing enumeration and description of employees include all persons employed in the service of this Employer in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid, allowed or due together with an estimate for the Policy Period of all such remuneration. This enumeration and description with the estimated remuneration shall also include the President, any Vice-President, Secretary or Treasurer of this Employer if a corporation if actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman, but any such designated officer not so engaged shall not be included in such enumeration, description or estimated remuneration. The foregoing estimates of remuneration are offered for the purpose of computing the advance premium. The Company shall be permitted to examine the books of this Employer at any time during the Policy Period and any extension thereof and within one year after its final termination so far as they relate to the remuneration earned by any employees of this Employer while the Policy was in force.

Item 5 This Employer is conducting no other business operations at this or any other location not herein disclosed — *except as herein stated:* no exceptions

Item 6. No similar insurance has been cancelled by any insurance carrier during the past year — *except as herein stated:* no exceptions

Item 7. The following signature is authorized and accepted by this Employer as his signature.

(Copy of Signature to Proposal) Harry M. Bralove

Per

FORM 7871-A

[fol. 14] EXHIBIT "B" TO DECLARATION

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the Matter of the Claim for Compensation under the District of Columbia Workmen's Compensation Act

Case No. 1274-3

ANNA ROBERTS, Claimant,

vs.

HARRY BRALOVE, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Compensation Order—Award of Compensation

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 22d day of January, 1929, Henry Roberts hereinafter referred to as the employee, was in the service of the employer above named at 3601 Connecticut Avenue, N. W., Washington, D. C. in the District of Columbia Compensation District, established under the District of Columbia Workmen's Compensation Act; that the liability of the employer for compensation under the said Act was insured by the insurance carrier above named; that on the said day the employee, while performing service as a laborer, sustained personal injury; that said injury arose out of and occurred in the course of his employment while he was engaged in wheeling brick in a wheelbarrow underneath the decking which was supporting newly-poured concrete, when the structure collapsed and the employee was caught beneath the concrete and débris and instantly killed; that the death was the result of the injury received as above described; that due notice thereof was given to the employer and to the Deputy Commissioner; that the employer furnished necessary medical treatment, etc. in [fol. 15] accordance with Section 7 (a) of said Act; that the average weekly wage was $19.04; that the claimant

herein, Mrs. Anna Roberts, was born on the 5th day of July, 1893; that the said Anna Roberts and Henry Roberts were married on the 23rd day of September, 1914; that at the time of the death the claimant was not living with the said employee, but was living apart for justifiable cause; that she is the surviving wife of the employee within the meaning of Section 2 (16) of the said Act; that she is entitled to compensation in the amount of 35 per cent of $19.04 per week, or $6.66 per week; that at the time of the death there were no surviving children of the above named union; that from January 22 to March 18, 1929, inclusive, there is due claimant eight weeks' compensation at the rate of $6.66 per week, amounting to $53.28; that the amount of the burial expenses exceeded $200; and that the attorney, James A. Toomey, rendered legal services in behalf of the said Mrs. Anna Roberts in the amount of $50.

Upon the foregoing facts the Deputy Commissioner makes the following

Award

That the employer, Harry M. Bralove, and the Insurance Carrier, The Ætna Life Insurance Company, shall pay compensation to the claimant, Mrs. Anna Roberts, the sum of $6.66 per week, beginning January 22, 1929; that from January 22 to March 18, 1929, eight weeks' compensation, in the amount of $53.28, is due and shall be paid forthwith; that future installments of compensation in the amount of $13.32 shall be paid every two weeks and shall continue until further ordered by the Deputy Commissioner; that fees in the amount of $50 shall be paid to Attorney James A. Toomey for legal services, and said amount shall be paid out of and constitute a lien upon the unpaid installments of compensation; that there shall be paid to P. A. Lomax burial expenses in the sum of $200; and that the employer and the insurance carrier shall pay the necessary medical and hospital expenses incurred during the period of disability and throughout the process of recovery.

Given under my hand at Washington, D. C., this nineteenth day of March, 1929.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District.

[fol. 16] Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, employer, insurance carrier, James A. Toomey, Attorney for claimant and P. A. Lomax, undertaker.

Name	Address
Anna Roberts	1339 29th Street, N. W., Washington, D. C.
Harry M. Bralove	1106 Vermont Avenue, N. W. " "
Ætna Life Insurance Co.	Investment Bldg., 15th & K Sts,, N. W., Washington, D. C.
James A. Toomey	1015 Fifteenth Street, N. W., Washington, D. C.
P. A. Lomax	1400 S Street, N. W., Washington, D. C.

R. J. Hoage, Deputy Commissioner.

Mailed March 19, 1929.

In Supreme Court of District of Columbia

Motion to Strike Declaration—Filed February 7, 1930

* * * * * * *

Comes now the defendant, Samuel D. Moses, by his attorneys, and moves the Court to strike out the first and second counts of the declaration filed herein.

Darr, Darr & Espey, by Sefton Darr, Attorneys for Defendant.

Note.—Among the matters intended to be argued in support of the aforegoing motion are the following:

1. That the Ætna Life Insurance Company sues as the assignee of Harry M. Bralove, and also sues as the assignor of Anna Roberts in her own right and as administratrix of Henry Roberts, deceased, and that the said Anna Roberts is suing in her own right as assignee, and suing as administratrix of the estate of Henry Roberts as assignee of the Ætna Life Insurance Company, thereby setting up three separate and distinct causes of action in favor of the Ætna Life Insurance Company, Anna Roberts in her own right and Anna Roberts as administratrix.

2. That the said declaration and both counts thereof show that there is a misjoinder of parties as all of said

[fol. 17] parties cannot, at the same time, maintain a cause of action based upon the facts averred in the declaration.

3. That the joinder of the three parties above named as parties plaintiff in a single cause of action constitutes repugnancy and inconsistency.

4. And for such other and further defects as appear on the face of said declaration.

Darr, Darr & Espey, by Sefton Darr, Attorneys for Defendant.

To Chas. W. Arth and Leonard J. Ganse, Esqs.,
Attorneys for plaintiffs:

Please take notice that we shall call the aforegoing motion to the attention of one of the Justices of the Supreme Court of the District of Columbia, holding a Circuit Court, on Friday, February 14, 1930, at 10 A. M., or as soon thereafter as counsel may be heard.

Darr, Darr & Espey, by Sefton Darr, Attorneys for Defendant.

Service of a copy of the aforegoing motion and notice acknowledged this 7th day of February, 1930.

Chas. W. Arth, Attorney for Plaintiffs.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OPINION—Filed July 15, 1930

* * * * * * *

The act provides that "acceptance of such compensation shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person, &c." Also that the payment of compensation shall operate as an assignment to the employer of all right of the legal representative of the deceased to recover damages against such third person and the employer may institute proceedings for the recovery of damages. The statute contains no other provision for the assignment of the right of action and as the right of

[fol. 18] action is not one of the class assignable at common law, the assignment to the insurance carrier is invalid. An additional reason would be that the beneficiaries under this act and those under § 1301 et seq. of the code are not the same.

The proper party plaintiff is therefore the administratrix to the use of the employer.

I think that the question of misjoinder of parties is properly raised by the motion to strike, which is sustained, with leave to the plaintiff to file an amended declaration within twenty days.

Bailey, J.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER GRANTING MOTION TO STRIKE—July 15, 1930

* * * * * * *

Upon consideration of defendant's motion filed herein to strike out the first and second counts of the declaration it is ordered that the same be and it is hereby granted; whereupon, said declaration is hereby stricken out with leave to amend in twenty days hereof.

MEMORANDA

August 1, 1930.—Motion for enlargement of time within which to file amended declaration and acknowledgment, filed.

Motion of plff. to enlarge time for filing amended declaration to and including September 2, 1930, granted.

August 29, 1930.—Motion for extension of time to file amended declaration, filed.

Time to file amended declaration extended to October 2, 1930.

September 30, 1930.—Suggestion of special appeal made. Proceeding in this cause stayed until November 2, 1930, or such further time necessary until disposition of said appeal.

[fol. 19] October 29, 1930.—Time to file amended declaration extended from day to day to and including December 23, 1930.

In Supreme Court of the District of Columbia

Judgment—Dec. 22, 1930.

* * * * * * *

Come now the plaintiffs by their attorneys of record and elect to stand upon their declaration to which a motion to strike out the first and second counts thereof was sustained on July 15th, 1930, and thereupon, it is ordered that judgment be entered.

Wherefore, it is considered that plaintiffs take nothing by this action, that defendant go hence without day, be for nothing held and recover of plaintiffs his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiffs by their said attorneys, in open court, note an appeal to the Court of Appeals; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the clerk in lieu thereof.

Memorandum as to Bond

December 29, 1930.—$50 deposited by plaintiff in lieu of bond on appeal.

In Supreme Court of District of Columbia

Assignment of Errors—Filed January 6, 1931

* * * * * * *

The errors committed by the Court are:

1. The Court erred in sustaining defendant's motion to strike the plaintiff's declaration, and in entering judgment for the defendant.

[fol. 20] 2. The Court erred in holding that in said declaration Ætna Life Insurance Company sues: (a) as the assignor of Anna Roberts in her own right and as administratrix of Henry Roberts, deceased; and (b) that the

said Anna Roberts is suing in her own right as assignee, and is also suing as administratrix of the estate of Henry Roberts as assignee of the Ætna Life Insurance Company.

3. The Court erred in holding that said declaration sets up three separate and distinct causes of action in each count thereof in behalf of Ætna Life Insurance Company, Anna Roberts in her own right, and as administratrix of the estate of Henry Roberts, deceased.

4. The Court erred in holding that said declaration and each count thereof shows a misjoinder of parties plaintiff, and that the parties plaintiff cannot, at the same time, maintain their actions herein.

5. The Court erred in holding that the joinder of the parties plaintiff as set forth in said declaration, in a single cause of action constitutes repugnancy and inconsistency.

6. The Court erred in holding that under the District of Columbia Workmen's Compensation Act (Act of Congress approved March 4, 1927, as amended by Act approved May 17, 1928, 45 Stat. at L. 600, c. 612; U. S. C. A. Title 33, Chapter 18) and Chapter 45, Secs. 1301-2-3 of the Code of Law for the District of Columbia, this action must be brought by Anna Roberts, administratrix of the estate of Henry Roberts, deceased to the use of the employer.

7. The Court erred in holding that Harry M. Bralove, the employer, could not maintain the action herein in his own name.

8. The Court erred in holding that Ætna Life Insurance Company, the carrier, could not maintain the action herein, and that under the District of Columbia Workmen's Compensation Act the carrier is not entitled to the same rights of action against the defendant herein as are given to the employer.

9. The Court er-ed in holding that Ætna Life Insurance Company, a corporation, in its own right and also to the use of Anna Roberts, in her own right and as administratrix of the estate of Henry Roberts, deceased, is not a proper party plaintiff to the action herein.

[fol. 21] 10. The Court erred in holding that Harry M. Bralove, an individual, to the use of Ætna Life Insurance

Company, a corporation, is not a proper party plaintiff to the action herein.

11. The Court erred in holding that Ætna Life Insurance Company, a corporation, in its own right is not a real party in interest having substantial rights to protect and a proper party plaintiff herein.

12. The Court erred in holding that Anna Roberts in her own right is not a real party in interest having substantial rights to protect and a proper use plaintiff herein.

13. The Court erred in holding that Anna Roberts, administratrix of the estate of Henry Roberts, deceased, is not a real party in interest having substantial rights to protect and a proper use plaintiff herein.

14. The Court erred in holding that Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, is not a real party in interest having substantial rights to protect and a proper party plaintiff herein.

15. The Court erred in holding that, under the District of Columbia Workmen's Compensation Act and Chapter 45, Secs. 1301-2-3 of the Code of Law for the District of Columbia, the action for the death of Henry Roberts by wrongful act, neglect, or default of defendant could not be assigned.

16. The Court erred in holding that misjoinder of parties plaintiff and causes of action are defects of form properly raised by motion to strike and not defects of substance properly raised only by demurrer.

17. The Court erred in other respects apparent of record.

Chas. W. Arth, Leonard J. Ganse, Attorneys for Plaintiffs.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed January 6, 1931

* * * * * * *

Now come the plaintiffs in the above entitled case and designate the parts of the record to be included in the [fols. 22 & 23] transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Caption.
2. Declaration.
3. Motion To Strike Declaration.
4. Memorandum of Bailey, Justice.
5. Minute Entry striking out Counts 1 and 2 of the Declaration with leave to amend.
6. Memorandum showing appropriate proceedings for and granting of extensions of time to plead, to and including December 23, 1930.
7. Minute Entry of plaintiff's election to stand on declaration; judgment against plaintiff for costs; noting of appeal in open court and fixing of bond.
8. Memorandum showing cash deposit for costs on appeal.
9. Assignment of Errors.
10. This Designation of Record.

Chas. W. Arth, Leonard J. Ganse, Attorneys for Plaintiffs.

Service of a copy of the foregoing Designation of Record is hereby acknowledged this 6th day of January, 1931.

Darr, Darr & Espey, by H. Clay Espey, Attorneys for Defendant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 24] Minute entry of argument and submission, February 8, 1932, omitted in printing.

[fol. 25] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5358

ÆTNNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Ætna Life Insurance Company, a Corporation, Appellants,

v.

SAMUEL D. MOSES, an Individual, Appellee

Appeal from the Supreme Court of the District of Columbia

(Argued February 8, 1932. Decided March 7, 1932)

Charles W. Arth and Leonard J. Ganse, both of Washington, D. C., for appellants.

Charles W. Darr, Sefton Darr, H. Clay Espey, and George Monk, all of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb and Groner, Associate Justices

OPINION

GRONER, Associate Justice:

This is an appeal from an order sustaining a motion of the defendant below (appellee) to strike the declaration of the plaintiffs (appellants). We shall speak of the parties as plaintiffs and defendant.

The declaration alleged that one Bralove, as general contractor, was engaged in the construction of a building in Washington, and, pursuant to the provisions of the workmen's compensation act (act Mar. 4, 1927, c. 509, 44 Stat. 1424; act May 17, 1928, c. 612, 45 Stat. 600; U. S. C. A. tit. 33, sec. 901 et seq.) was insured by Ætna Life Insurance Co. against liability for the payment of compensation to employees or their dependents; that one Henry Roberts was employed by Bralove as a laborer, and, while in the performance of his work, was killed through the negligence of Samuel D. Moses (defendant), a subcontractor on the work; that the widow of Roberts filed claim under the compensation act and an award was made to her by the commissioner; that Ætna Company has paid and will be required to pay the amounts covered by the award, and, because of this and a

provision of the insurance policy and likewise a provision [fol. 26] of the act, it was subrogated to all rights of Bralove (the employer) and the persons entitled to compensation.

In the declaration the parties plaintiff are stated as "Ætna Life Insurance Company, a corporation doing business in the District of Columbia, in its own right, and also to the use of Anna Roberts, in her own right, and as administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation."

The single question which we have to decide is, Was there a misjoinder of parties plaintiff in the declaration, or, expressed otherwise, Who are proper parties plaintiff, or use plaintiff, in an action brought against a third party wrongdoer under the facts shown in the declaration?

The District of Columbia workmen's compensation act (U. S. C. A. tit. 33) provides in sec. 909:

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: * * * (b) If there be a surviving wife * * * and no child of the deceased under the age of eighteen years (as was found to be the case here), to such wife * * * 35 per centum of the average wages of the deceased, during widowhood * * * with two years' compensation in one sum upon remarriage * * *."

Section 914 (m) provides:

"The total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."

Section 932 provides that the employer shall secure the payment of compensation to his employees "by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund * * *."

And section 933, which relates to compensation for injuries where third persons are liable, is as follows:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giv-

ing notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or recover damages against such third person.

"(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:"

the employer shall retain, the expenses incurred in the proceedings; the cost of all benefits furnished the employee; all amounts paid as compensation, and the present value of all amounts payable as compensation; and everything in excess shall be paid to the person entitled to compensation or to his personal representative.

Subsections (f) and (g) of section 933 provide that if the person entitled to compensation or the representative elects to bring an action for damages against such third [fol. 27] person and receives, or compromises, with the approval of the employer, for less than the amount of compensation which would have been paid except for such election, the employer must pay the difference.

There is a still further provision (sec. 935) to the effect that notice to the employer shall be notice to the insurance carrier, and the jurisdiction by the commissioner or court of the employer shall carry with it jurisdiction of the carrier, and the finding of the commissioner shall be binding on the carrier equally with the employer.

The policy of insurance contains a provision subrogating the company, to the extent of any payments made by it, to all rights of recovery vested by law either in the employer or in any employee or his dependents against third persons, etc.

The trial court was of opinion that there was a misjoinder of parties plaintiff and that the proper party plaintiff was the "administratrix to the use of the employer."

We think the action should have been brought by the administratrix in accordance with the provisions of chapter 45 of the D. C. Code (1924, sec. 1302; tit. 21, sec. 2, D. C. Code 1929).

As we have already seen, the declaration names as parties Ætna Company, the insurer, in its own right and to the use of Mrs. Roberts, the widow, in her own right and as administratrix of deceased, and Bralove, the employer, to the use of Ætna Company, and it is insisted that this is a proper and logical arrangement of the parties plaintiff because the Ætna has paid the widow, who is solely entitled to death benefits under the act, and her acceptance of payment has transferred her right of action to Bralove by the terms of the act, but since Bralove himself has paid nothing, he has no cause of action on which to sue, and the purposes of the act would be thwarted unless his rights passed to the Ætna Company as his insurer. But this contention overlooks the well-established rule of the common law which governs in the District of Columbia, under which neither Ætna nor Bralove nor the widow in her own right is a proper legal plaintiff without specific statutory authority. Glenn v. Marbury, 145 U. S. 499, 509. There is no general statute in the District of Columbia changing the common law in this respect.

It is necessary, therefore, to turn to the statute (the compensation act) to ascertain whether, when compensation is paid or to be paid in a death case, the liability of the third person tort feasor is not only continued in force for the benefit of the employer but whether the statute also confers a new right or privilege by virtue of which the employer may assert the claim in his own name. The statute, as we have seen, provides acceptance of compensation "shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person," and such employer "may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding." Obviously these provisions place upon the injured employee the duty of determining either to receive the compensation or to pursue his common law remedy against the third person liable for his injuries, and, if he elects to receive the compensation, the effect is to transfer his cause of action to his employer. In the latter case the employer's rights would be analogous to those of an insurance company to [fol. 28] sue the one who has caused the damage where it has paid the loss for which it is liable under its policy.

If there is any difference, it arises out of the fact that the right of subrogation in the case of the insurance company grows out of the nature of the contract of indemnity and in the case of the employer by the terms of the act, but in either case, as we think, the action under the rules of the common law should be asserted in the name of the party injured. See St. Louis Ry. v. Insurance Co., 139 U. S. 223, 235.

But the case instanced is that of an election by the injured person himself. If, instead of injury, death results through the negligence of a third person, a new cause of action nonexistent at common law is created by the provisions of the wrongful death statute (sec. 1301, D. C. Code 1924; tit. 21, D. C. Code 1929) in favor of the widow and next of kin of such deceased person, but it must be brought in the name of the personal representative within a year of the death of the deceased, and there is nothing in the compensation act which abrogates or limits the rights conferred by this statute, but, on the contrary, it specifically provides if "the representative"—meaning personal representative—elects to recover damages he may do so just as fully and in the same way as if no compensation act were in existence. On the other hand, if, on account of death for which compensation is payable, the person entitled to such compensation accepts compensation, such acceptance shall operate as an assignment to the employer of the right of the person "entitled to compensation" to recover damages against a third person tort feasor, and the employer "on account of such assignment may institute proceedings for the recovery of damages." The effect of the act, therefore, as we view it, is to cause the acceptance of payment of compensation to operate as an assignment of the right of the person entitled to compensation to recover damages against such third person. The compensation act in this way creates a valid assignment but no new or different right, for the right which is assigned is to prosecute an action under the wrongful death statute and that right remains the same and exists by virtue of that statute alone, and as section 1302 of the District Code (1924) provides that every action brought under it shall be brought in the name of the personal representative, and, as we held in Fleming v. Capital Traction Co., 40 App.

D. C. 489, no other person may bring the action, we think it is perfectly clear that there was a misjoinder of parties plaintiff in the bringing of the action.

It is quite true that the contrary of this has been held by a number of State courts in construing the provisions of State compensation laws, but in every case which has come to our attention the act itself made provision accordingly. Typical of these cases is Silvia v. Scotten, 32 Del. 295; 122 Atl. 513, 516. There the Supreme Court of Delaware, in answer to the query to which we have addressed ourselves, said:

"It thus appearing that the employer is in exclusive possession of the claim for damages against the third person tort-feasor, the next question is, how must he assert the claim? The statute in section 131 answers this question. It provides that he 'may recover in his own name, or that of the injured employee'."

Similar language is found in the California statute. Insurance Co. v. Railways, 178 Pac. 974. See also Hall v. Thayer, 225 Mass. 151, 113 N. E. 644.

[fol. 29] But the statute in the District of Columbia does not so provide. It makes the acceptance of compensation to operate as an assignment but it confers no new right or privilege changing the common law rule as to the manner in which the assignment may be enforced. In the case of an injured employee, the assignment is made to embrace "all right" of the injured person. In the case of an injury resulting in death, the assignment embraces "all right of the person entitled to compensation." Whether Congress meant by the language last quoted to confine the assignment to the distributive share of the recovery to which the person receiving compensation under the act would be entitled, or to give a right to complete indemnity in the entire recovery, as by the subsequent section is implied, we are not now called upon to decide. It is sufficient for present purposes to hold, as we do, that the act itself concerns primarily employer and employe. Its purpose is to adjust and fix their mutual rights and obligations, and, as incident to this, to preserve, in the case of a third party, the right to proceed against him for a tortious act. Such proceeding may be by the injured himself unaffected by the act, but, if he elects to accept compensation, the act, by

its terms, preserves his right for the benefit or indemnity of his employer, but in such case the employer must, under the rule of the common law, assert it in the employee's name. If the injury results in death, the beneficiaries under the act may refuse compensation and look primarily to the third party wrongdoer, or, instead, they may accept it and thus, as the act provides, transfer their right to the employer, but, in either case, the recovery must be sought as the statute creating the right directs.

Affirmed.

A true copy. Test:

—— ——, Clerk Court of Appeals, D. C.

[fol. 30] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA, JANUARY TERM, 1932

* * * * * * *

No. 5358

ÆTNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Ætna Life Insurance Company, a Corporation, Appellants,

vs.

SAMUEL D. MOSES, an Individual

JUDGMENT—March 7, 1932

Appeal from the Supreme Court of the Dist ict of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

Per Mr. Justice Groner, March 7, 1932.

(Mr. Justice Van Orsdel and Mr. Justice Hitz took no part in the consideration or decision of this case.)

[fol. 31] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 16, 1932

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment.
5. This designation.
6. Clerk's certificate.

Chas. W. Arth, Leonard J. Ganse, Attorneys for Appellants.

Service of copy of the foregoing designation of record [fol. 32] is hereby acknowledged this 16th day of May, 1932.

Sefton Darr, George Monk, Attorneys for Appellee.

[fol. 33] [File endorsement omitted.]

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,834. District of Columbia Court of Appeals. Term No. 137. Ætna Life Insurance Company, etc., et al., petitioners, vs. Samuel D. Moses. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1932. File No. 36,834.

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 6 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 137

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED, AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

v.

SAMUEL D. MOSES, AN INDIVIDUAL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

CHARLES W. ARTH,
LEONARD J. GANSE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED, AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

v.

SAMUEL D. MOSES, AN INDIVIDUAL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ætna Life Insurance Company, a corporation, in its own right, and also to the use of Anna Roberts, in her

own right and as Administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia in the above-entitled case (its docket No. 5358) entered on March 7, 1932 (R. 31), affirming an order and judgment of the Supreme Court of the District of Columbia.

Statement.

This case involves the construction and interpretation of Sec. 33 (*a*) (*b*) (*d*) and (*e*) of the Longshoremen's and Harbor Workers' Compensation Act (Act of Mar. 4, 1927, c. 509, 44 Stat. 1424) as applied for purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). The case arises upon an appeal from an order of the Supreme Court of the District of Columbia sustaining the motion of the defendant (respondent herein) to strike the declaration of plaintiffs (petitioners herein), and a judgment entered in favor of the defendant upon plaintiffs' election to stand upon the declaration as drawn. The parties will be designated hereinafter as plaintiffs and defendant.

The action was brought to recover damages under the Compensation Act for a death caused by negligence of a person other than the employer. The declaration alleged that one Bralove, as general contractor, was engaged in the construction of a building in Washington,

and, pursuant to the provisions of the Compensation Act, was insured by Ætna Life Insurance Company against liability for the payment of compensation to employees or their dependents; that one Henry Roberts was employed by Bralove as a laborer, and, while in the course of his employment, was killed through the negligence of Samuel D. Moses (defendant), a subcontractor on the work; that Anna Roberts, widow of the decedent, filed claim for death benefit under the Compensation Act, and, after hearing, an award was made to her by the deputy commissioner against Bralove, employer, and Ætna Life Insurance Company, insurance carrier; that Ætna Life Insurance Company has paid and will be required to pay the amounts therein ordered; that as insurer of Bralove, as subrogee under the policy and assignee under the Act, it was subrogated to and assigned all rights of Bralove and the person entitled to compensation; that under the statute and by reason of the premises plaintiffs had been damaged in the sum of $10,000.00, for which damages were claimed (R. 2-16).

The declaration states the parties as follows:

> "Ætna Life Insurance Company, a corporation doing business in the District of Columbia, in its own right, and also to the use of Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, sue the defendant, Samuel D. Moses" (R. 2, 9).

The policy of compensation insurance issued by Ætna Life Insurance Company to Bralove, made a part

of the declaration (R. 3, 10), contains the following provision:

"Subrogation of Rights.

> "K— The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates" (Policy, R. 13).

A copy of the Findings of Fact and Award (R. 14-16) entered by the deputy commissioner on Anna Robert's claim for death benefit is likewise made a part of the declaration (R. 8, 12).

Defendant Moses filed a motion to strike the declaration and each count thereof, setting up as grounds misjoinder of parties plaintiff and causes of action, repugnancy, and inconsistency (R. 16). The presiding justice sustained the motion with leave to amend (R. 18), and filed a written memorandum in the cause (R. 17-18), holding that because the Compensation Act contains no provision for assignment of rights of action to recover damages against third persons to any one other than the employer, and because the right of action was not one of the class assignable at common law, the assignment by Bralove to Ætna Life Insurance Company was invalid; and further, that the proper party plaintiff was the administratrix to the use of the employer, this apparently upon the theory that the cause of action was created and controlled not only by the Compensation Act, but was also subject to the terms and provisions of

the statute for "Negligence Causing Death" (Code D. C. 1924, Chapter Forty-five, Section 1301 *et seq.*).

Plaintiffs elected to stand upon the declaration as drawn, whereupon judgment was entered for the defendant, and plaintiffs noted their appeal to the Court of Appeals of the District of Columbia (R. 19).

The Court of Appeals affirmed the judgment of the lower court (R. 31), and rendered an opinion wherein it was held that the action should have been brought by the administratrix in accordance with the provisions of the death statute (Code D. C. 1924, Chapter Forty-five, Section 1302), because the Compensation Act creates no new cause of action and attempts only to assign the right of action theretofore existing under the death statute (R. 24-30).

Questions of Law Presented.

1. What are the respective rights and interests of compensation insurance carrier, employer, the person taking under the award, and the personal representative of the decedent, in actions to recover damages for death of an employee caused by a negligent third person?

2. Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death"?

3. For whose benefit and in what form may the action be maintained?

Reasons for Granting the Petition.

1. The case here presented is of great importance and relates to the construction to be given Sec. 33 of the Longshoremen's and Harbor Workers' Compensation Act. The questions which arise upon defendant's motion to strike the declaration involve procedural and substantive rights going to the very basis of all actions to recover damages for death of an employee caused by negligent acts of persons other than the employer.

2. The decisions of the courts below requiring the Compensation Act to be construed together with and subject to the limitations of negligent death statutes cast grave doubt upon, if they do not wholly cut off, all rights of action against negligent third persons causing death of employees. The rulings of the lower courts subject the terms and application of Sec. 33 of the Compensation Act to all the vagaries and limitations of death statutes of local character; or even to total abrogation if no death statutes exist.

3. The instant case, in holding that an employer may not assign to his carrier by conventional subrogation a right of action taken by him under Sec. 33 (*b*) of the Compensation Act, is in conflict with *The Kokusai Kisen Kabushiki Kaisha* (D. C. Texas), 44 F. (2d) 659.

4. The instant case is a departure from the rule, long settled in the Federal Courts, that an insurer under an indemnity policy takes a right of action as

legal subrogee of the assured upon payment of a claim for damages caused by a negligent third person. The case is in conflict with the principles laid down in the cases of *Travelers' Insurance Co.* v. *Great Lakes Engineering Works Co.* (C. C. A. 6th), 184 Fed. 426, 107 C. C. A. 20; *Workmen's Compensation Exchange* v. *Chicago, M. St. P. & P. R. Co.* (D. C. Idaho), 45 F. (2d) 885, involving compensation statutes. The case is a departure from the principles enunciated in the indemnity insurance cases of *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397; *Sea Ins. Co. of Liverpool et al.* v. *Vicksburg, S. & P. Ry. Co.* (C. C. A.), 159 Fed. 676; *Southern Ry. Co.* v. *Blunt & Ward* (C. C.), 165 Fed. 258.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5358, Ætna Life Insurance Company, a corporation, in its own right and also to the use of Anna Roberts, in her own right and as administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, appellants, *v.* Samuel D. Moses, and that said judgment of the Court of Appeals of the District of Columbia may be reversed

by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioners will ever pray.

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED, AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION,

By CHARLES W. ARTH,
LEONARD J. GANSE,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED, AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

v.

SAMUEL D. MOSES, AN INDIVIDUAL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The memorandum opinion filed in the cause in the Supreme Court of the District of Columbia (R. 17) is not reported.

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The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 24), and is reported in 57 F. (2d) 440.

II.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered March 7, 1932 (R. 31). Jurisdiction of this Court is invoked under Judicial Code, Section 240 (*a*), as amended by the Act of February 13, 1925 (c. 231, sec. 240, 36 Stat. 1157; c. 229, sec. 1, 43 Stat. 938).

III.

Statement.

A statement of the facts and the questions involved will be found in the petition for writ of certiorari.

IV.

Specification of Errors to Be Urged.

1. The Court erred in holding that Ætna Life Insurance Company does not have any right of action because the action was not assignable at common law and the assignment to the insurance carrier was invalid.

2. The Court erred in holding that the Compensation Act must be construed together with, and that it is subject to the limitations and restrictions of, the statute for "Negligence Causing Death".

3. The Court erred in holding that Ætna Life Insurance Company, insurance carrier which has paid death benefit under the award, may not sue in its own name and right, and also to the use of the person entitled to compensation and the administratrix of the estate of the decedent, to recover damages for death of an employee killed by negligent act of a third person.

4. The Court erred in holding that Harry M. Bralove, employer, may not sue in his own name to the use of Ætna Life Insurance Company, carrier, to which he has assigned his right of action against the negligent third party causing death of the employee.

5. The Court erred in holding that the action must be brought in the name of the administratrix to the use of the employer.

6. The Court erred in sustaining defendant's motion to strike the declaration.

V.

Statutes and Rules of Court Involved.

The statutes and rules of court involved are set out in the Appendix (*infra*, pp. 33-44).

VI.

Argument.

The orders of the lower courts sustaining defendant's motion to strike the declaration present substantive and procedural questions of law.

In actions to recover damages from a negligent third person causing death of an employee within the terms of the Longshoremen's and Harbor Workers' Compensation Act (as applied for purpose of Workmen's Compensation to the District of Columbia), an award of death benefit having been made thereunder, the questions arising under Compensation Act, Sec. 33, are:

1. What are the respective rights and interests of

A. The compensation insurance carrier,

B. The employer,

C. The beneficiary under the award (compensee), and

D. The personal representative of the decedent?

2. Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death"?

3. For whose benefit and in what form may the action be maintained?

1.

What are the respective rights and interests of carrier, employer, compensee, and personal representative, under Sec. 33 of the Compensation Act?

Henry Roberts, employee, was killed by the negligence of defendant Moses, a person other than the employer, and death benefit was awarded to Anna

Roberts, his widow, against Ætna Life Insurance Company, carrier, and Bralove, employer. Anna Roberts is also the duly appointed administratrix of the estate of the decedent. The rights, liabilities, and interests of all parties concerned are controlled by Sec. 33 of the Compensation Act (Appendix, pp. 39-40).

Sec. 33 (*a*) provides that the person entitled to compensation may elect either to receive it or to recover damages against the negligent third person (Appendix, p. 39).

Sec. 33 (*b*) provides that the acceptance of compensation constitutes such election, and operates as an assignment to the employer of all right of the person entitled to compensation to recover damages from the negligent third person (Appendix, p. 39).

Sec. 33 (*d*) provides that the employer on account of such assignment may either institute proceedings to recover damages or may compromise with such third person either before or after instituting suit (Appendix, p. 40).

Sec. 33 (*e*) governs distribution of any recovery, stating: (1) that the employee *shall retain* an amount equal to: (A) the expenses incurred by him in the proceedings or compromise including a reasonable attorney's fee; (B) the costs of all medical, surgical and other attendance, etc., provided for by Sec. 7 of the Act; (C) all amounts already paid as compensation, and an additional amount to be held as a trust fund for the payment of future instalments of compensation as they become due, such fund to be the present value of all amounts payable as compensation and to be com-

puted from a schedule prepared by the Compensation Commissioner (Appendix, p. 40).

Any excess thereover is required to be paid to the person entitled to compensation or to the representative (Appendix, p. 40). (See also Sec. 33 (*e*) (2), Appendix, p. 40).

A. Rights and Interest of Carrier.

The award of death benefit to Anna Roberts, widow, only person entitled thereto (R. 15) under Sec. 9 of the Act (Appendix, p. 34) was entered against both Bralove, employer, and Ætna Life Insurance Company, carrier (R. 8, 12, 15). By the literal wording of Sec. 33 (*b*), acceptance of the death benefit by Anna Roberts, widow assigned to the employer all her right to recover damages—*not* as personal representative of the estate of the decedent suing under Code D. C., Section 1301 *et seq.*, for "Negligence Causing Death" (Appendix, pp. 42-43), *but as the person entitled to death benefit under the Compensation Act.* Bralove, however, has sustained no actual loss nor has he paid the death benefit. His liability is only contingent, although fixed by the award. He will pay only if and when the carrier fails to pay. No action can be maintained by the employer in his own right. *City of Red Wing* v. *Eichinger et al., infra*). Unless Ætna Life Insurance Company be held to take a right which it may enforce against the negligent wrongdoer, any action against the tort-feasor must fail.

City of Red Wing v. *Eichinger et al.*, 163 Minn. 54, was a case wherein the city employed one Haga as a

street sweeper, both city and employee being subject to the Minnesota Workmen's Compensation Act. The city carried compensation insurance with the Traveler's Insurance Company. While Haga was engaged in his employment he was injured by a collision between two automobiles operated by the defendants. The Industrial Commission made an award to the employee and the insurance company paid it. The city thereafter brought suit against the defendants to recover for the injuries negligently inflicted by them on its employee. The trial court dismissed the action. The ruling was upheld upon appeal on the ground that the city was not a real party in interest; that the insurance company and not the city had suffered the loss. It was further said that the cause of action was in the insurance company which had paid the loss, and that such right of subrogation as the employer (city) had, it had assumed to pass to its insurance carrier by a subrogation clause of the policy identical in wording with the provision of the policy in the instant case.

Ætna Life Insurance Company is not a gratuitous volunteer. Sec. 4 of the Compensation Act makes the employer liable for and requires him to secure the payment of compensation to his employees (Appendix, p. 33).

Sec. 32 requires every employer to secure the payment of compensation either by insuring with a duly authorized insurance company or by furnishing satisfactory proof of his financial ability to pay (Appendix, p. 38).

Ætna Life Insurance Company, carrier, has an interest in a three-fold aspect in this case:

(1) As Statutory Assignee by Necessary Implication.

A reading of the Compensation Act demonstrates that the terms "carrier" and "employer" are used synonymously. Nothing in the statutory definitions of the words makes them mutually exclusive (Sec. 2 (4) (5)), to the contrary, the term "carrier" includes self-insurers (Appendix, p. 33).

Carrier and employer have reciprocal rights and liabilities. Sec. 17 makes the award of compensation a lien against the assets of both carrier and employer, without limit of amount, as is or may thereafter be allowed by law to the claimant for unpaid wages or otherwise (Appendix, p. 37).

Sec. 35 substitutes carrier for employer in order that the liability for compensation under the statute may be most effectively discharged by the employer. The section further provides for discharge by the carrier of the obligations and duties of the employer under such regulations as the compensation commission may provide. For such purposes (1) notice to or knowledge of the employer of the occurrence of an injury is notice to or knowledge of the carrier; (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court, under the Act, is jurisdiction of the carrier; and (3) any requirement by a deputy commissioner, the commission, or any court, under any compensation order, finding or decision, is binding upon the carrier in the same manner

and to the same extent as upon the employer (Appendix, p. 40).

Sec. 36 provides that every contract of insurance issued under the Act shall contain a provision to carry out the requirements of Sec. 35; and further that insolvency or bankruptcy of the employer and/or his discharge therein shall not relieve the carrier (Appendix, p. 41).

An assumption by the carrier of all liabilities and duties imposed on the employer by the Act necessarily imports the granting of rights accruing thereby. In *Sarber* v. *Ætna Life Insurance Co.* (C. C. A. 9th), 23 F. (2d) 434, certiorari denied 277 U. S. 577, it was said:

> "This was an action for deceit. It appears from the original complaint that on July 23, 1923, the plaintiff was an employee, within the contemplation and under the provisions of the Workmen's Compensation Act of the state of California (St. 1913, p. 279, as amended); * * * that the defendant, as insurance carrier, took over and assumed the burdens, duties and obligations imposed on the employer by the Compensation Act; * * *
>
> "It should be stated at the outstart that, when the insurance carrier is substituted for the employer under the provisions of the Compensation Act, the carrier is subrogated to all the rights and duties of the employer."

It is submitted that the right of action passing to the employer by statutory assignment under Sec. 33 (*b*) likewise passed to Ætna Life Insurance Company

by necessary implication upon payment by it of the death benefit awarded.

(2) As "Legal Subrogee" Under an Indemnity Policy.

As indemnitor under the Workmen's Compensation Insurance policy issued by it to the employer, Ætna Life Insurance Company has a right of action against the negligent third person. This point has been so decided in the Federal Courts:

In *Travelers' Ins. Co.* v. *Great Lakes Engineering Works Co.* (C. C. A. 6th), 184 Fed. 426, 107 C. C. A. 20, defendant was engaged in installing an engine in a brewery. A cylinder head of the engine blew out and one employee of the brewery was killed and another injured. Actions were brought under the Ohio employers' liability statute against the brewing company by the injured employee and also by certain persons on behalf of the next of kin of the deceased employee. Damages were paid by the plaintiff insurance company which had issued an employer's liability policy containing a provision that, in case of payment of a loss thereunder the insurance company should be subrogated to the extent of such payment to all rights of recovery for such loss by the assured against third persons. The insurance company instituted an action against the defendant engineering company setting up these facts. The defendant demurred to the declaration upon the grounds of no cause of action and misjoinder of parties plaintiff, which demurrer was sustained and the action dismissed. The appellate court reversed the lower court, saying that

an action lay in the name and right of the insurance carrier, independent of any death statute. With respect to legal subrogation under the policy it was said:

> "We are thus brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee.
>
> "The rule is well settled in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss; this right not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only. * * *
>
> "We know of no reason, either upon principle or authority, why the doctrine of subrogation which has been expressly held applicable to indemnity by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity."

Workmen's Compensation Exchange v. *Chicago, M., St. P. & P. R. Co.*, (D. C. Idaho), 45 F. (2d) 885, is a recent case to a like effect. There one Honig, an employee of a timber company, was killed in a collision between a truck driven by him and a train operated by

the defendant. Claims for compensation were filed on behalf of the widow and minor children of the decedent against the employer timber company, and the carrier, which had issued a policy of workmen's compensation insurance to the employer. An award of $8,189.39 was entered against both employer and carrier. The carrier was paying the award to the beneficiaries. The employer and carrier thereupon instituted their action in the Federal District Court to recover damages from the negligent third person for the loss plus certain expenses. The defendant demurred and moved to strike, assigning as grounds that no right of action existed in favor of the plaintiffs, and, if so, that there was misjoinder of parties plaintiff. The court held that there were rights of action in both the employer, as statutory assignee under the Idaho Workmen's Compensation Act, and the carrier, as legal subrogee under its policy of indemnity, citing *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Sea Ins. Co. of Liverpool et al.* v. *Vicksburg S. & P. Ry. Co.* (C. C. A.), 159 Fed. 676, 17 L. R. A. (N. S.) 925; *Southern Ry. Co.* v. *Blunt & Ward* (C. C.), 165 Fed. 258; 26 *C. J.* 435.

Upon the foregoing authorities, it is submitted that the Supreme Court of the District of Columbia erred in holding that: "The statute contains no other provision for the assignment of the right of action and as the right of action is not one of the class assignable at common law, the assignment to the insurance carrier is invalid" (R. 17-18).

(3) As "Conventional Subrogee" Under the Compensation Insurance Policy.

Ætna Life Insurance Company stands in still another aspect in the case at bar. It took a right of action as conventional subrogee under the terms of the policy. Paragraph K provides that the insurance company "shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates" (R. 13). Assignments of rights of action by such provisions have been held valid, although the actions were not assignable at common law.

The *Kokusai Kisen Kabushiki Kaisha* (D. C. Texas), 44 F. (2d) 659, was an action arising under the Longshoremen's and Harbor Worker's Compensation Act, brought by the compensation insurance carrier and the employee to recover damages from the negligent third person inflicting an injury. One objection to the action was whether, if the employer refuses to sue, the action over being purely statutory and precisely defined, the carrier could take any right of action by subrogation. The carrier obtained an assignment of the cause of action from the employer. It was held that the assignment was enforceable and the carrier could maintain the action.

In *Globe Indemnity Co.* v. *Toye Bros. Auto & Taxicab Co., Inc.* (La. App. 1930), 129 So. 235, one La Barbera, an employee of one Daroca, was injured in the course of his employment by being run into from

the rear by a taxicab of the defendant. La Barbera was paid compensation by the Globe Indemnity Company, compensation insurer of the employer. The carrier then brought an action to recover damages from the negligent third person, the taxicab company. Among the defenses set up were that there was no cause or right of action, and non-joinder of parties plaintiff or defendant. The Louisiana compensation Act in force at the time of the injury made no provision for subrogation or assignment of the right of action to any one other than the employer. The policy of compensation insurance, however, contained a subrogation clause almost identical in wording with that of paragraph K in the instant case. The Court of Appeal held the conventional subrogation by the employer in favor of the insurance company valid and enforceable.

Under these authorities it is submitted that the trial court erred in holding the conventional assignment to the carrier by the employer invalid (R. 17-18).

If Ætna Life Insurance Company may not maintain the action against defendant Moses, whose negligence caused the employee's death, an anomalous situation exists. Anna Roberts, widow, has exercised her election under Sec. 33 (*a*) (*b*) and has accepted death benefit under the Compensation Act (Longshoremen's and Harbor Worker's Compensation Act). She may not maintain an action in her own name although she has an interest as statutory *cestui que* trust in any excess of recovery had against defendant Moses. *Hunt* v. *Bank Line* (C. C. A. 4th), 35 F. (2d) 136. (See also

infra, p. 24). Bralove, employer, may not maintain an action in his own right. *City of Red Wing* v. *Eichinger,* 163 Minn. 54. (See also *infra.*) If the contention of the defendant and the ruling of the lower court be true, no action arising under the Compensation Act may be maintained against the negligent tort-feasor causing the death.

B. Rights and Interest of Employer.

The award entered by the deputy commissioner provides: "That the employer, Harry M. Bralove, and the Insurance Carrier, The Ætna Life Insurance Company, shall pay compensation * * *" (R. 15). But the employer has sustained no loss nor paid the award. His liability though fixed is contingent. He will have to pay only if and when his compensation insurance carrier fails to pay. As statutory assignee under Sec. 33(*b*) he purports to take a right of action which he may not enforce because he has sustained no damage. *City of Red Wing* v. *Eichinger,* 163 Minn. 54. By express terms of the insurance policy, however, the employer has assigned the right of action to the carrier. It is proper that Harry M. Bralove sue to the use of Ætna Life Insurance Company, his assignee. *Glenn* v. *Marbury,* 145 U. S. 499, 508; *W. G. Armstrong Whitworth & Co.* v. *Norton,* 15 App. D. C. 223. The lower courts in the instant case have said, however, that the action must be in the name of the administratrix to the use of the employer, this, although the employer does not take as assignee of the personal representative in any aspect. He is statutory assignee of

the "person entitled to compensation," which right of action he has assigned to his carrier.

C. Rights and Interest of Compensee.

Anna Roberts stands in a two-fold relation to the case at bar. She is in one aspect the "person entitled to compensation" under the Act. In the other she is the administratrix of the estate of the decedent (*infra*, p. 25). As the person entitled to compensation, she is beneficiary under an award of death benefit which may equal $7,500.00 (cf. Sec. 14 (m), Appendix, p. 37). If recovery be had in the instant case in an amount in excess of such sums as are to be retained as attorney's fees and expenses, the cost of medical, surgical and other benefits furnished under Sec. 7, and all amounts already paid as compensation (cf. Sec. 33 (e) (1) (A) (B) and (C), Anna Roberts, compensee, has a *real interest* in the recovery. The present value of all future payments of compensation would be computed, and the excess, to the extent of the computed amount, would be retained "as a trust fund to pay such compensation as it becomes due" (Sec. 33 (e) (1) (C)). To the extent of the difference between any sums retained for expenditures, and the computed value of future payments, Anna Roberts has an active interest as statutory *cestui que trust*. *Stackpole* v. *Pacific Gas & Electric Co.*, 181 Cal. 700; *Bassot et al.* v. *United Railroads of San Francisco*, 39 Cal. App. 60, 177 Pac. 884.

D. Rights and Interest of the Personal Representative of Decedent.

Anna Roberts is the duly appointed administratrix of the estate of Henry Roberts, deceased. In event of a recovery of damages from defendants in excess of the amounts properly deductible by the carrier for expenditures and the computed value of the trust fund for payment of future compensation, "any sum, in excess of such compensation" would be paid to her as personal representative for distribution as part of the estate of the decedent (Sec. 33 (e) (1) (C) and Sec. 33 (e) (2)). Anna Roberts, administratrix, has a real interest in the action. *Stackpole* v. *Pacific Gas & Electric Co., supra; Bassot et al.* v. *United Railroads of San Francisco, supra.*

2.

Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death?"

The courts below have held that the Compensation Act must be construed together with, and the form of action be governed by, Code D. C., Section 1302 (R. 18, 24-30). Petitioners assert that the Compensation Act, Sec. 33, creates a new cause of action, makes complete provision for all of its purposes, and is not controlled or limited by the negligent death statute in any respect. The Court of Appeals of the District of Columbia has so held in an analogous case—*Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466.

In that case, which arose under the Employers' Liability Act, one Christiana Hyde, as administratrix of the estate of one Richard Hyde, deceased, brought an action against the railroad company to recover damages laid at $20,000.00 in each count of the declaration, for the death of her intestate from an act of negligence of the defendant. The trial courts sustained a demurrer to the first four counts of the declaration upon the ground that the recovery under the Liability Act was subject to the control of Code D. C., Section 1301, which limits the recovery of damages for injuries resulting in death from wrongful act of any person to $10,000.00. A special appeal was taken to the Court of Appeals of the District of Columbia. That court reversed the ruling of the lower court, holding that the Employers' Liability Act created a new cause of action for the benefit of employees of a common carrier in the District of Columbia, and, in case of their death, for the benefit of widows, children and other next of kin. The appellate court said further that the operation and objects of the two statutes were different; that the Liability Act operated in the several Territories; and that so far as the court could determine, the intention of the Congress was to give the act operation according to its terms, independent of any control of the negligent death statute.

A. The Compensation Act and the Death Statute Are Inconsistent.

The terms of the two statutes make it difficult, if not impossible, to construe them together.

(1) *Limitations of Time are Different:* Compensation Act, Sec. 13 (*a*), provides that a claim for death benefit may be filed within one year after the death, except if payment of death benefit has been made without an award, in which event the claim may be filed within one year after the date of last payment (Appendix, p. 36). By Sec. 13 (*b*), failure to file the claim within such period is not a bar to the right unless objection thereto is made at the first hearing (Appendix, p. 36). Sec. 13 (*c*) and (*d*) provide for other contingencies enlarging the time for filing claims (Appendix, p. 36). But Code D. C., Section 1302, requires that all actions for negligence causing death "shall be brought * * * within one year after the death of the party injured" (Appendix, p. 43). It is not only possible, but probable, that claims for death benefit under the Compensation Act may be filed at such time, or the procedure in the Compensation Commission or courts be so delayed, that an award of death benefit, thereby "assigning to the employer all right of the person entitled to compensation," can not be entered within one year after death of the party injured. See *Great Lakes Dredge & Dock Co. et al.* v. *Brown, etc.* (D. C. Ill.) 47 F. (2d) 265. If the Compensation Act and death statute must be construed together, as held by the courts below, the absurd result would be that the employer and carrier take a right of action by assignment under the Compensation Act upon entry of an award, which right had ceased to exist prior thereto because the action to recover damages was not instituted within the time limited by the death statute.

(2) *Causes of Action are Different:* Code D. C., Section 1301 (Appendix, p. 42), creates a right of action on behalf of the widow and next of kin of the decedent. *Southern Railway Co.* v. *Hawkins,* 35 App. D. C., 313. Sec. 33 (*a*) of the Compensation Act creates a right of action in the "person entitled to compensation" as determined by Sec. 9. If the two statutes must be construed together, a question which would necessarily arise would be: "What right has a widow *as such* to assign under Code D. C., Section 1301?" The answer would be, "None!" The situation then is that Sec. 33 (*a*) (*b*) of the Compensation Act provides for assignment of an action which does not exist. The only logical conclusion which can be drawn in view of inconsistency of the statutes is that each is self-sufficient.

(3) *Beneficiaries are Different:* Code D. C., Section 1301, creates a cause of action, and damages are assessed, for the benefit of the widow and next of kin of the decedent. Compensation Act, Sec. 9, creates death benefit in behalf of persons who may be different from those designated in the death statute (Appendix, p. 34).

Compensation Act, Sec. 44, requires employer and carrier to pay $1,000.00 into a rehabilitation fund for designated purposes in cases where it is determined that there is no person entitled to compensation within the meaning of the Act (Appendix, p. 42). By Sec. 33 (*c*) payment into the fund operates "as an assignment to the employer of all right of the legal representative of the deceased * * * to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his

election" (Appendix, p. 39). But it has been held by the Court of Appeals in *Neubeck* v. *Lynch*, 37 App. D.C. 576, 571, that in actions to recover for negligence causing death it must be alleged and proved that there are dependent next of kin. If death statute and Compensation Act must be construed together, the right of action accruing to employer and carrier under Sec. 33 (*c*) of the Act would be unenforceable because it would be impossible to allege or prove the existence of any beneficiary within the meaning of the Compensation Act.

4. *Damages are Different:* Code D. C., Section 1301, limits the amount of recovery to $10,000.00. There is no suggestion of limitation of amount in the Compensation Act. A limitation of $10,000.00 on the amount that may be recovered under the death statute would defeat the express provisions of Sec. 33 (*e*), where, as provided by that section, employer and carrier may retain their expenditures and the computed value of future instalments, and the excess thereover is to be paid to the personal representative.

5. *Distribution of Damages is Different:* Code D. C., Section 1303, provides that damages recovered shall inure to the benefit of the family of the decedent and be distributed according to the provisions of the statute of distribution in force in the District of Columbia (Appendix, p. 43). Under that statute, a widow, there being no children, could not take more than one-half of the amount recovered under the death statute. In no event could she receive more than $5,000.00, one-half of the maximum amount of $10,000.00 limited by Section 1301. But Compensation Act, Secs. 9 and 14

(*m*), provide for death benefit to the widow in an amount which may equal $7,500.00.

There may also be next of kin entitled to share in a distribution under Sec. 1303 of the death statute who would have no rights under the Compensation Act (Compare Compensation Act, Sec. 9 (*b*) (*c*) (*d*) (*g*), Appendix, p. 34).

In view of the inconsistencies the petitioners submit that the cause of action in the instant case arises under the Compensation Act, unencumbered by any of the provisions of the death statute.

3.

For Whose Benefit and In What Form May the Action be Maintained?

The Rules of the Supreme Court of the District of Columbia govern the form of action in the case at bar and designate who must or may be made parties herein (see Rules, Appendix, p. 44). These rules have the force of law. *Judd & Detweiler* v. *Gittings*, 43 App. D. C. 304, 311; *Murphy* v. *Gould*, 39 App. D. C. 363, 367. Equity Rule 13—expressly made applicable to actions at law—provides that:

> "Every action shall be prosecuted in the name of the real party in interest, but * * * (*a*) trustee of an express trust, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs * * *" (Appendix, p. 44).

Ætna Life Insurance Company, carrier paying the death benefit, is a real party in interest and may maintain an action in its own right to recover its loss from the wrongdoer. The *Kokusai Kisen Kabushiki Kaisha* (D. C. Texas), 44 F. (2d) 659; *Travelers' Ins. Co.* v. *Great Lakes Engineering Works Co., supra,* p. 18, *Workmen's Compensation Exchange* v. *Chicago, M., St. P. & P. R. Co.* (D. C. Idaho), 45 F. (2d) 885; *City of Red Wing* v. *Eichinger,* 163 Minn. 54.

Anna Roberts, widow, as the person awarded death benefit, has a real interest in the proceeding. She is the statutory *cestui que trust* for whom a portion of any excess of recovery will be held in trust for the payment of future installments. (*Compensation Act,* Sec. 33 (*e*) (1) (C). She is a proper use plaintiff. *Stackpole* v. *Pacific Gas and Electric Co.,* 181 Cal. 700; *Bassot et al.* v. *United Railroads of San Francisco,* 39 Cal. App. 60, 177 Pac. 884.

Anna Roberts, administratrix of the estate of Henry Roberts, deceased, has a real interest in the action. As personal representative she will take any excess of damages recovered, after deduction of the amounts having preferential claim (*Compensation Act,* Sec. 33 (*e*) (1) (C) and Sec. 33 (*e*) (2). In this capacity she is also a proper use plaintiff.

Harry M. Bralove, employer, has a direct but contingent liability for death benefit awarded. His right to proceed against the wrongdoer, such as it may be, has been assigned to the insurance carrier assuming his liability and paying the award. He may and should

sue as assignor to the use of the Insurance Company, his assignee.

It has been held, upon objections identical with those raised by the defendant herein, that the technical niceties of common law pleading and the provisions of death statutes as to the form of titling do not apply to cases arising under compensation acts. *Clough & Molloy* v. *Shilling*, 149 Md. 189. For variation in the manner of pleading parties plaintiff in death actions similar to that here presented, see *Maryland Casualty Co. et al.* v. *Union Bridge Electric Mfg. Co.*, 145 Md. 644; *State Accident Fund* v. *N. Y., P. & N. R. Co.*, 141 Md. 305; *Bethlehem Steel Co.* v. *Raymond Concrete Pile Co.*, 141 Md. 67; *Kaufman* v. *United Railways & Electric Co.*, 135 Md. 524.

CONCLUSION.

Under a practical application of the Compensation Act and the rules of court, and in the light of the cases cited, it is submitted that the declaration presents no misjoinder of causes of action, and joins as parties plaintiff only those whose interests could be affected by the verdict and judgment; a writ of certiorari should be granted, and this Court should review the decision of the Court of Appeals of the District of Columbia, and finally reverse it.

Respectfully,

CHARLES W. ARTH,
LEONARD J. GANSE,
Counsel for Petitioners.

APPENDIX.

Longshoremen's and Harbor Workers' Compensation Act, (Act of March 4, 1927, C. 509, 44 Stat. 1924).

* * * * * * *

DEFINITIONS.

SEC. 2. When used in this Act—

* * * * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Act of May 17, 1928, C. 612, 45 Stat. 600:

* * * in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

* * * * * * *

LIABILITY FOR COMPENSATION.

SEC. 4 (*a*) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. * * *

(*b*) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * * * *

MEDICAL SERVICES AND SUPPLIES.

SEC. 7. (*a*) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require. * * *

COMPENSATION FOR DEATH.

SEC. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * * * *

(*b*) If there be a surviving wife or dependent husband and no child of the deceased under the age of eighteen years, to such wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowhood with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased under the age of eighteen years, the additional amount of 10 per centum of such wages for each such child until the age of eighteen years; in case of the death or remarriage of such surviving wife or dependent husband any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to 15 per centum of such wage, and the same shall be payable until he shall reach the age of eighteen years: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the pur-

pose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(*c*) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then for the support of each such child under the age of eighteen years, 15 per centum of the wages of the deceased: *Provided*, That the aggregate shall in no case exceed 66⅔ per centum of such wages.

(*d*) If there be no surviving wife or dependent husband or child under the age of eighteen years or if the amount payable to a surviving wife or dependent husband and to children under the age of eighteen years shall be less in the aggregate than 66⅔ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person until the age of eighteen years and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66⅔ per centum of such wages, and the amount payable as hereinbefore provided to the surviving wife or dependent husband and for the support of surviving child or children.

* * * * * * *

(*g*) Aliens: Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that depend-

ents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future instalments of compensation as determined by the commission.

* * * * * * *

TIME FOR FILING OF CLAIMS

SEC. 13 (*a*) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(*b*) Notwithstanding the provisions of subdivision (*a*) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(*c*) If a person who is entitled to compensation under this Act is mentally incompetent or a minor, the

provisions of subdivision (*a*) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(*d*) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (*a*) shall begin to run only from the date of termination of such suit.

* * * * * * *

PAYMENT OF COMPENSATION.

Sec. 14 * * *

(*m*) The total compensation payable under this Act for injury or death shall in no event exceed the sum of $7,500.

* * * * * * *

COMPENSATION A LIEN AGAINST ASSETS.

Sec. 17. Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise.

* * * * * * *

SECURITY FOR COMPENSATION.

Sec. 32. (*a*) Every employer shall secure the payment of compensation under this Act—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the commission, to insure payment of compensation under this Act; or

(2) By furnishing satisfactory proof to the commission of his financial ability to pay such compensation and receiving an authorization from the commission to pay such compensation directly. The commission may, as a condition to such authorization, require such employer to deposit in a depository designated by the commission either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the commission, and subject to such conditions as the commission may prescribe, which shall include authorization to the commission in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(*b*) In granting authorization to any carrier to insure payment of compensation under this Act the commission may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of com-

pensation under this Act in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this Act. The commission may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No suspension or revocation shall affect the liability of any carrier already incurred.

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

SEC. 33. (*a*) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(*b*) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(*c*) The payment of such compensation into the fund established in Section 44 shall operate as an assignment to the employer of all right of the legal rep-

resentative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(*d*) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(*e*) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under Section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

SUBSTITUTION OF CARRIER FOR EMPLOYER.

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability for compensa-

tion imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the commission shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES.

SEC. 36. (*a*) Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

(*b*) No contract or policy of insurance issued by a carrier under this Act shall be canceled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the deputy commissioner and to the employer in accordance with the provisions of subdivision (*c*) of section 12.

* * * * * * *

SPECIAL FUND.

SEC. 44. (*a*) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (*f*) and (*g*) of section 8 of this Act. Such fund shall be administered by the commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(*b*) The Treasurer is authorized to disburse moneys from such fund only upon order of the commission.

* * * * * * *

(*c*) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (*f*) of section 8, and 50 per centum shall be available for payments under subdivision (*g*) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

Code D. C. 1924, Chapter Forty-five.

NEGLIGENCE CAUSING DEATH.

SEC. 1301. LIABILITY.—Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by

the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person; *Provided,* That in no case shall the recovery under this act exceed the sum of ten thousand dollars: *And provided further,* That no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

Sec. 1302. By Whom Suit to be Brought.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

Sec. 1303. Distribution of Damages.—The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia.

Rules of Court.

Supreme Court of the District of Columbia, 1929:

LAW RULES.

The law rules shall apply in equity, and the equity rules shall apply at law, unless inconsistent with the rules prescribed.

EQUITY RULES.

The equity rules shall apply at law and the law rules shall apply in equity unless inconsistent with the rules prescribed.

13.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but (*a*) * * * trustee of an express trust, * * * or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the case. Persons having a united interest may be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of the propriety of the main proceeding.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 137

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED; AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

vs.

SAMUEL D. MOSES, AN INDIVIDUAL.

BRIEF FOR PETITIONERS.

CHARLES W. ARTH,
LEONARD J. GANSE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 137

ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, IN ITS OWN RIGHT, AND ALSO TO THE USE OF ANNA ROBERTS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF HENRY ROBERTS, DECEASED; AND HARRY M. BRALOVE, AN INDIVIDUAL, TO THE USE OF ÆTNA LIFE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

vs.

SAMUEL D. MOSES, AN INDIVIDUAL.

BRIEF FOR PETITIONERS.

I.

Statement.

This case involves the construction and interpretation of Sec. 33 (*a*) (*b*) (*d*) and (*e*) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424) as applied for

purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). The case arises upon an appeal from an order of the Supreme Court of the District of Columbia sustaining the motion of the defendant (respondent herein) to strike the declaration of plaintiffs (petitioners herein), and a judgment entered in favor of the defendant upon plaintiffs' election to stand upon the declaration as drawn. The parties will be designated hereinafter as plaintiffs and defendant.

The action was brought to recover damages under the Compensation Act for a death caused by negligence of a person other than the employer. The declaration alleged that one Bralove, as general contractor, was engaged in the construction of a building in the District of Columbia and, pursuant to the provisions of the Compensation Act, was insured by Ætna Life Insurance Company against liability for the payment of compensation to employees or their dependents; that one Henry Roberts was employed by Bralove as a laborer, and, while in the course of his employment, was killed through the negligence of Samuel D. Moses (defendant), a subcontractor on the work; that Anna Roberts, widow of the decedent, filed claim for death benefit under the Compensation Act, and, after hearing, an award was made to her by the deputy commissioner against Bralove, employer, and Ætna Life Insurance Company, insurance carrier; that Ætna Life Insurance Company has paid and will be required to pay the amounts therein ordered; that as insurer of Bralove, as subrogee under the policy and assignee under the Act, it was subrogated to and

assigned all rights of Bralove and the person entitled to compensation; that under the statute and by reason of the premises plaintiffs had been damaged in the sum of $10,000. for which damages were claimed (R. 1-15).

The declaration states the parties as follows:

> "Ætna Life Insurance Company, a corporation doing business in the District of Columbia, in its own right, and also to the use of Anna Roberts in her own right and as administratrix of the estate of Henry Roberts, deceased, and Harry M. Bralove, an individual, to the use of Ætna Life Insurance Company, a corporation, sue the defendant, Samuel D. Moses" (R. 1, 7-8).

The policy of compensation insurance issued by Ætna Life Insurance Company to Bralove, made a part of the declaration (R. 2, 8), contains the following provision:

> **"Subrogation of Rights.**
>
> "K—The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates" (Policy, R. 12A).

A copy of the findings of fact and award (R. 13-15) entered by the deputy commissioner on Anna Roberts' claim for death benefit is likewise made a part of the declaration (R. 7, 11).

Defendant Moses filed a motion to strike the declaration and each count thereof, setting up as grounds misjoinder of parties plaintiff and causes of action, repugnancy, and inconsistency (R. 15-16). The presiding justice sustained the motion with leave to amend (R. 17), and filed a written memorandum in the cause (R. 16-17), holding that because the Compensation Act contains no provision for assignment of rights of action to recover damages against third persons to anyone other than the employer, and because the right of action was not one of the class assignable at common law, the assignment by Bralove to Ætna Life Insurance Company was invalid; and further, that the proper party plaintiff was the administratrix to the use of the employer, this apparently upon the theory that the cause of action was created and controlled not only by the Compensation Act, but was also subject to the terms and provisions of the statute for "Negligence Causing Death" (Code D. C. 1924, Chapter Forty-five, Section 1301 *et seq.*).

Plaintiffs elected to stand upon the declaration as drawn, whereupon judgment was entered for the defendant, and plaintiffs noted their appeal to the Court of Appeals of the District of Columbia (R. 18).

The Court of Appeals affirmed the judgment of the lower court (R. 28), yet rendered an opinion wherein it was held that the action should have been brought, not by the "administratrix to the use of the employer" as held by the trial court, but "by the administratrix in accordance with the provisions of chapter 45 of the D. C. Code (1924, sec. 1302; tit. 21, sec. 2, D. C. Code 1929)" (R. 22-28).

II.

Opinions of the Courts Below.

The memorandum opinion filed in the case in the Supreme Court of the District of Columbia (R. 16-17) is not reported.

The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 22-28) and is reported in — App. D. C. —, 57 F. (2d) 440.

III.

Questions of Law Presented.

1. What are the respective rights and interests of compensation insurance carrier, employer, the person taking under the award, and the personal representative of the decedent, in actions to recover damages for death of an employee caused by a negligent third person?

2. Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death"?

3. For whose benefit and in what form may the action be maintained?

IV.

Specification of Errors.

1. The Court erred in holding that Ætna Life Insurance Company does not have any right of action because the action was not assignable at common law and the assignment to the insurance carrier was invalid.

2. The Court erred in holding that the Compensation Act must be construed together with, and that it is subject to the limitations and restrictions of, the statute for "Negligence Causing Death".

3. The Court erred in holding that Ætna Life Insurance Company, insurance carrier which has paid death benefit under the award, may not sue in its own name and right, and also to the use of the person entitled to compensation and the administratrix of the estate of the decedent, to recover damages for death of an employee killed by negligent act of a third person.

4. The Court erred in holding that Harry M. Bralove, employer, may not sue in his own name to the use of Ætna Life Insurance Company, carrier, to which he has assigned his right of action against the negligent third party causing death of the employee.

5. The Court erred in holding that the action must be brought in the name of the administratrix to the use of the employer.

6. The Court erred in sustaining defendant's motion to strike the declaration.

V.

Statutes and Rules of Court Involved.

The statutes and rules of court involved are set out in the Appendix (*infra*, pp. 30/42).

VI.

Argument.

The orders of the lower courts sustaining defend-

ant's motion to strike the declaration present substantive and procedural questions of law.

In actions to recover damages from a negligent third person causing death of an employee within the terms of the Longshoremen's and Harbor Workers' Compensation Act (as applied for purpose of Workmen's Compensation to the District of Columbia), an award of death benefit having been made thereunder, the questions arising under Compensation Act, Sec. 33, are:

1. What are the respective rights and interests of
   A. The compensation insurance carrier,
   B. The employer,
   C. The beneficiary under the award (compensee), and
   D. The personal representative of the decedent?

2. Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death"?

3. For whose benefit and in what form may the action be maintained?

1.

What are the respective rights and interests of carrier, employer, compensee, and personal representative, under Sec. 33 of the Compensation Act?

Henry Roberts, employee, was killed by the negligence of defendant Moses, a person other than the employer, and death benefit was awarded to Anna Roberts, his widow, against Ætna Life Insurance

Company, carrier, and Bralove, employer. Anna Roberts is also the duly appointed administratrix of the estate of the decedent. The rights, liabilities, and interests of all parties concerned are controlled by Sec. 33 of the Compensation Act (Appendix, p. 36).

Sec. 33 (*a*) provides that the person entitled to compensation may elect either to receive it or to recover damages against the negligent third person (Appendix, p. 36).

Sec. 33 (*b*) provides that the acceptance of compensation constitutes such election, and operates as an assignment to the employer of all right of the person entitled to compensation to recover damages from the negligent third person (Appendix, p. 37).

Sec. 33 (*d*) provides that the employer on account of such assignment may either institute proceedings to recover damages or may compromise with such third person either before or after instituting suit (Appendix, p. 37).

Sec. 33 (*e*) governs distribution of any recovery, stating: (1) that the employer *shall retain* an amount equal to: (A) the expenses incurred by him in the proceedings or compromise including a reasonable attorney's fee; (B) the costs of all medical, surgical and other attendance, etc., provided for by Sec. 7 of the act; (C) all amounts already paid as compensation, and an additional amount to be held as a trust fund for the payment of future instalments of compensation as they become due, such fund to be the present value of all amounts payable as compensation and to be computed from a schedule prepared by the Compensation Commissioner (Appendix, p. 37).

Any excess thereover is required to be paid to the person entitled to compensation or to the representative (Appendix, p. 37). (See also Sec. 33 (*e*) (2), Appendix, p. 38.)

A. Rights and Interest of Carrier.

The award of death benefit to Anna Roberts, widow, only person entitled thereto (R. 14) under Sec. 9 of the Act (Appendix, p. 31) was entered against both Bralove, employer, and Ætna Life Insurance Company, carrier (R. 7, 8, 11, 14). By the literal wording of Sec. 33 (*b*), acceptance of the death benefit by Anna Roberts, widow, assigned to the employer all her right to recover damages—*not* as personal representative of the estate of the decedent suing under Code D. C., Section 1301 *et seq.*, for "Negligence Causing Death" (Appendix, pp. 40, 41), *but as the person entitled to death benefit under the Compensation Act.* Bralove, however, has sustained no actual loss nor has he paid the death benefit. His liability is only contingent, although fixed by the award. He will pay only if and when the carrier fails to pay. No action can be maintained by the employer in his own right. *City of Red Wing* v. *Eichinger et al., infra.* Unless Ætna Life Insurance Company be held to take a right which it may enforce against the negligent wrongdoer, any action against the tort-feasor must fail.

City of Red Wing v. *Eichinger et al.*, 163 Minn. 54, was a case wherein the city employed one Haga as a street sweeper, both city and employee being subject to the Minnesota Workmen's Compensation Act. The city carried compensation insurance with the Travel-

er's Insurance Company. While Haga was engaged in his employment he was injured by a collision between two automobiles operated by the defendants. The Industrial Commission made an award to the employee and the insurance company paid it. The city thereafter brought suit against the defendants to recover for the injuries negligently inflicted by them on its employee. The trial court dismissed the action. The ruling was upheld upon appeal on the ground that the city was not a real party in interest; that the insurance company and not the city had suffered the loss. It was further said that the cause of action was in the insurance company which had paid the loss, and that such right of subrogation as the employer (city) had, it had assumed to pass to its insurance carrier by a subrogation clause of the policy—(identical in wording with the provision of the policy in the instant case).

Ætna Life Insurance Company is not a gratuitous volunteer. Sec. 4 of the Compensation Act makes the employer liable for and requires him to secure the payment of compensation to his employees (Appendix, p. 30). Sec. 32 requires every employer to secure the payment of compensation either by insuring with a duly authorized insurance company or by furnishing satisfactory proof of his financial ability to pay (Apdendix, p. 35).

Ætna Life Insurance Company, carrier, has an interest in a three-fold aspect in this case:

(1) As Statutory Assignee by Necessary Implication.

A reading of the Compensation Act demonstrates that the terms "carrier" and "employer" are used synonymously. Nothing in the statutory definitions

of the words makes them mutually exclusive (Sec. 2 (4) (5)); to the contrary, the term "carrier" includes self-insurers (Appendix, p. 30).

Carrier and employer have reciprocal rights and liabilities. Sec. 17 makes the award of compensation a lien against the assets of both carrier and employer, without limit of amount, as is or may thereafter be allowed by law to the claimant for unpaid wages or otherwise (Appendix, p. 35).

Sec. 35 substitutes carrier for employer in order that the liability for compensation under the statute may be most effectively discharged by the employer. The section further provides for discharge by the carrier of the obligations and duties of the employer under such regulations as the compensation commission may provide. For such purposes (1) notice to or knowledge of the employer of the occurrence of an injury is notice to or knowledge of the carrier; (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court, under the Act, is jurisdiction of the carrier; and (3) any requirement by a deputy commissioner, the commission, or any court, under any compensation order, finding or decision, is binding upon the carrier in the same manner and to the same extent as upon the employer (Appendix, p. 38).

Sec. 36 provides that every contract of insurance issued under the Act shall contain a provision to carry out the requirements of Sec. 35; and further that insolvency or bankruptcy of the employer and/or his discharge therein shall not relieve the carrier (Appendix, p. 38).

The carrier is not a gratuitous volunteer, but is under a direct obligation to the injured employee. *American Mutual Liability Ins. Co.* v. *Patrick,* 157 Tenn. 618, 621.

An assumption by the carrier of all liabilities and duties imposed on the employer by the Act necessarily imports the granting of rights accruing thereby. In *Sarber* v. *Ætna Life Insurance Co.* (C. C. A. 9th), 23 F. (2d) 434, certiorari denied 277 U. S. 577, it was said:

> "This was an action for deceit. It appears from the original complaint that on July 23, 1923, the plaintiff was an employee, within the contemplation and under the provisions of the Workmen's Compensation Act of the State of California (St. 1913, p. 279, as amended); * * * that the defendant, an insurance carrier, took over and assumed the burdens, duties and obligations imposed on the employer by the Compensation Act; * * *
>
> "It should be stated at the outstart that, when the insurance carrier is substituted for the employer under the provisions of the Compensation Act, the carrier is subrogated to all the rights and duties of the employer."

It is submitted that the right of action passing to the employer by statutory assignment under Sec. 33(*b*) likewise passed to Ætna Life Insurance Company by necessary implication upon payment by it of the death benefit awarded.

(2) As "Legal Subrogee" Under an Indemnity Policy.

As indemnitor under the Workmen's Compensation Insurance policy issued by it to the employer, Ætna

Life Insurance Company has a right of action against the negligent third person. This point has been so decided in the Federal Courts:

In *Travelers' Ins. Co.* v. *Great Lakes Engineering Works Co.* (C. C. A. 6th), 184 Fed. 426, 107 C. C. A. 20, defendant was engaged in installing an engine in a brewery. A cylinder head of the engine blew out and one employee of the brewery was killed and another injured. Actions were brought under the Ohio employers' liability statute against the brewing company by the injured employee and also by certain persons on behalf of the next of kin of the deceased employee. Damages were paid by the plaintiff insurance company which had issued an employer's liability policy containing a provision that, in case of payment of a loss thereunder, the insurance company should be subrogated to the extent of such payment to all rights of recovery for such loss by the assured against third persons. The insurance company instituted an action against the defendant engineering company setting up these facts. The defendant demurred to the declaration upon the grounds of no cause of action and misjoinder of parties plaintiff, which demurrer was sustained and the action dismissed. The appellate court reversed the lower court, saying that an action lay in the name and right of the insurance carrier, independent of any death statute. With respect to legal subrogation under the policy it was said:

> "We are thus brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third

party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee.

"The rule is well settled in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss; this right not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only. * * *

"We know of no reason, either upon principle or authority, why the doctrine of subrogation which has been expressly held applicable to indemnity by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity."

Workmen's Compensation Exchange v. *Chicago, M., St. P. & P. R. Co.* (D. C. Idaho), 45 F. (2d) 885, is a recent case to a like effect. There one Honig, an employee of a timber company, was killed in a collision between a truck driven by him and a train operated by the defendant. Claims for compensation were filed on behalf of the widow and minor children of the decedent against the employer timber company, and the carrier which had issued a policy of workmen's compensation insurance to the employer. An award of $8,189.39 was entered against both employer and carrier. The carrier was paying the award to the bene-

ficiaries. The employer and carrier thereupon instituted their action in the Federal District Court to recover damages from the negligent third person for the loss plus certain expenses. The defendant demurred and moved to strike, assigning as grounds that no right of action existed in favor of the plaintiffs, and, if so, that there was misjoinder of parties plaintiff. The court held that there were rights of action in both the employer, as statutory assignee under the Idaho Workmen's Compensation Act, and the carrier, as legal subrogee under its policy of indemnity, citing *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Sea Ins. Co. of Liverpool et al.* v. *Vicksburg S. & P. Ry. Co.* (C. C. A.), 159 Fed. 676, 17 L. R. A. (N. S.) 925; *Southern Ry. Co.* v. *Blunt & Ward* (C. C.), 165 Fed. 258; 26 *C. J.* 435.

Upon the foregoing authorities, it is submitted that the Supreme Court of the District of Columbia erred in holding that: "The statute contains no other provision for the assignment of the right of action and as the right of action is not one of the class assignable at common law, the assignment to the insurance carrier is invalid" (R. 16-17).

(3) As "Conventional Subrogee" Under the Compensation Insurance Policy.

Ætna Life Insurance Company stands in still another aspect in the case at bar. It took a right of action as conventional subrogee under the terms of the policy. Paragraph K provides that the insurance company "shall be subrogated in case of any payment

under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates'' (R. 12A). Assignments of rights of action by such provisions have been held valid, although the actions were not assignable at common law.

The Kokusai Kisen Kabushiki Kaisha (D. C. Texas), 44 F. (2d) 659, was an action arising under the Longshoremen's and Harbor Worker's Compensation Act, brought by the compensation insurance carrier and the employee to recover damages from the negligent third person inflicting the injury. One objection to the action was whether, if the employer refuses to sue, the action over being purely statutory and precisely defined, the carrier could take any right of action by subrogation. The carrier obtained an assignment of the cause of action from the employer. It was held that the assignment was enforceable and the carrier could maintain the action. On a trial of this case before another judge, this ruling was upheld. See *The Aden Maru,* 51 F. (2d) 599 (entering judgment for the respondents on the merits).

In *Globe Indemnity Co.* v. *Toye Bros. Auto & Taxicab Co., Inc.,* 14 La. App. 142, 129 So. 234, one La Barbera, an employee of one Daroca, was injured in the course of his employment by being run into from the rear by a taxicab of the defendant. La Barbera was paid compensation by the Globe Indemnity Company, compensation insurer of the employer. The carrier then brought an action to recover damages from

the negligent third person, the taxicab company. Among the defenses set up were that there was no cause or right of action, and non-joinder of parties plaintiff or defendant. The Louisiana compensation Act in force at the time of the injury made no provision for subrogation or assignment of the right of action to anyone other than the employer. The policy of compensation insurance, however, contained a subrogation clause almost identical in wording with that of paragraph K in the instant case. The Court of Appeal held the conventional subrogation by the employer in favor of the insurance company valid and enforceable.

Under these authorities it is submitted that the trial court erred in holding the conventional assignment to the carrier by the employer invalid (R. 16-17).

If Ætna Life Insurance Company may not maintain the action against defendant Moses, whose negligence cause the employee's death, an anomalous situation exists, because Anna Roberts, widow, having accepted death benefit under the Compensation Act, may not maintain an action in her own name although she has an interest as statutory *cestui que trust* in any excess of recovery had against defendant Moses (*Hunt* v. *Bank Line* (C. C. A. 4th), 35 F. (2d) 136; *The Aden Maru,* 51 F. (2d) 599, 600); and Bralove, employer, may not maintain an action in his own right because he has sustained no loss. *City of Red Wing* v. *Eichinger,* 163 Minn. 54. If the contention of the defendant and the ruling of the lower court be true, no action arising under the Compensation Act may be

maintained against the negligent tort-feasor causing the death.

B. Rights and Interest of Employer.

The award entered by the deputy commissioner provides: "That the employer, Harry M. Bralove, and the Insurance Carrier, The Ætna Life Insurance Company, shall pay compensation * * *" (R. 15). But the employer has sustained no loss nor paid the award. His liability though fixed is contingent. He will have to pay only if and when his compensation insurance carrier fails to pay. As statutory assignee under Sec. 33 (*b*) he purports to take a right of action which he may not enforce because he has sustained no damage. *City of Red Wing* v. *Eichinger,* 163 Minn. 54. By express terms of the insurance policy, however, the employer has assigned the right of action to the carrier. It is proper that Harry M. Bralove sue to the use of Ætna Life Insurance Company, his assignee. *Glenn* v. *Marbury,* 145 U. S. 499, 508; *W. G. Armstrong Whitworth & Co. v. Norton,* 15 App. D. C. 223. The lower courts in the instant case have said, however, that the action must be in the name of the administratrix to the use of the employer, this, although the employer does not take as assignee of the personal representative in any aspect. He is statutory assignee of the "person entitled to compensation," which right of action he has assigned to his carrier.

C. Rights and Interest of Compensee.

Anna Roberts stands in a two-fold relation to the case at bar. She is in one aspect the "person entitled

to compensation" under the Act. In the other she is the administratrix of the estate of the decedent (*infra*, p. 19).

As the person entitled to compensation, she is beneficiary under an award of death benefit which may equal $7,500. (cf. Sec. 14 (*m*), Appendix, p. 35). If recovery be had in the instant case in an amount in excess of such sums as are to be retained as attorney's fees and expenses, the cost of medical, surgical and other benefits furnished under Sec. 7, and all amounts already paid as compensation (cf. Sec. 33 (*e*) (1) (A) (B) and (C)), Anna Roberts, compensee, has a *real interest* in the recovery. The present value of all future payments of compensation would be computed, and the excess, to the extent of the computed amount, would be retained "as a trust fund to pay such compensation as it becomes due" (Sec. 33 (*e*) (1) (C)). To the extent of the difference between any sums retained for expenditures, and the computed value of future payments, Anna Roberts has an active interest as statutory *cestui que trust*. *Stackpole* v. *Pacific Gas & Electric Co.*, 181 Cal. 700; *Bassot et al.* v. *United Railroads of San Francisco*, 39 Cal. App. 60, 177 Pac. 884.

D. Rights and Interests of the Personal Representative of Decedent.

Anna Roberts is the duly appointed administratrix of the estate of Henry Roberts, deceased. In event of a recovery of damages from defendants in excess of the amounts properly deductible by the carrier for expenditures, and the computed value of the trust fund

for payment of future compensation, "any sum, in excess of such compensation" would be paid to her as personal representative for distribution as part of the estate of the decedent (Sec. 33 (*e*) (1) (C) and Sec. 33 (*e*) (2)). Anna Roberts, administratrix, has a real interest in the action. *Stackpole* v. *Pacific Gas & Electric Co., supra; Bassot et al.* v. *United Railroads of San Francisco, supra.*

2.

Must the Compensation Act be construed together with, and is it subject to the limitations prescribed by, statutes creating actions for "Negligence Causing Death"?

The courts below have held that the Compensation Act must be construed together with, and the form of action be governed by, Code D. C., Section 1302 (R. 18, 24-30). Petitioners assert that the Compensation Act, Sec. 33, creates a new cause of action, makes complete provision for all of its purposes, and is not controlled or limited by the negligent death statute in any respect. This contention is directly supported by the recent decision in *Moore* v. *Christienson S. S. Co.* (D. C. Georgia), 49 F. (2d) 807, affirmed (C. C. A. 5th) 53 F. (2d) 299, arising under the Longshoremen's and Harbor Workers' Compensation Act.

That case arose from a libel brought by Moore, as administrator of the estate of one Albert Moore, deceased, against the Christienson Steamship Company under the Georgia Statute for recovery for homicide

(Lord Campbell's Act). The allegations of the libel were that on September 9, 1929, the decedent, an employee of one Dixie Stevedoring Company, was engaged with others in loading freight into the ship of the Steamship Company, when he was killed through negligence on the part of the vessel; that so far as libellant knew there was no one entitled to recover compensation under the Longshoremen's and Harbor Workers' Compensation Act; that the suit was brought for the benefit "of Minnie Green, a sister of the said Albert Moore, who was totally dependent upon him for support." Subsequent to the filing of the libel the deputy commissioner under the Longshoremen's Act entered a finding "That there is no person entitled under the Longshoremen's and Harbor Workers' Compensation Act to compensation for the death of the said Albert Moore." Thereafter, the United States Fidelity & Guaranty Company paid $1,000. under Section 44 of the Compensation Act as the insurer of the Stevedoring Company, the employer. By appropriate pleading the Steamship Company contended that the libellant had no right of action, whatever might be its negligence, for the reason that the Longshoremen's Act provided for other and exclusive remedy in such cases. The District Court and Circuit Court of Appeals held that where Congress, having power to deal with a subject coming within the police powers of a State, passed a statute indicating an intention on its part to take possession of that field of activity, and providing for rights of action thereunder, there no longer existed any right of recovery of indemnity for the death of the employee under the

death statute of the State, citing *Lindgren* v. *United States*, 281 U. S. 38. The courts held that the Longshoremen's Act exhausted the field and left nothing for the State death statute to operate upon.

The Court of Appeals of the District of Columbia has so held in an analagous case—*Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466. In that case, which arose under the Employers' Liability Act, one Christiana Hyde, as administratrix of the estate of one Richard Hyde, deceased, brought an action against the railroad company to recover damages laid at $20,000. in each count of the declaration, for the death of her intestate from an act of negligence of the defendant. The trial court sustained a demurrer to the first four counts of the declaration upon the ground that the recovery under the Liability Act was subject to the control of Code D. C., Section 1301, which limits the recovery of damages for injuries resulting in death from wrongful act of any person to $10,000. A special appeal was taken to the Court of Appeals of the District of Columbia. That court reversed the ruling of the lower court, and held that the Employers' Liability Act created a new cause of action for the benefit of employees of a common carrier in the District of Columbia, and, in case of their death, for the benefit of widows, children and other next of kin. The appellate court said further that the operation and objects of the two statutes were different; that the Liability Act operated in the several Territories; and that so far as the court could determine, the intention of the Congress was to give the act operation

according to its terms, independent of any control of the negligent death statute.

See also *Smith's Dock Company* v. *John Readhead & Sons,* (1912) 2 King's Bench 323.

A. The Compensation Act and the Death Statute Are Inconsistent.

The terms of the two statutes make it difficult, if not impossible, to construe them together.

(1) *Limitations of Time are Different:* Compensation Act, Sec. 13 (*a*), provides that a claim for death benefit may be filed within one year after the death, except if payment of death benefit has been made without an award, in which event the claim may be filed within one year after the date of last payment (Appendix, p. 33). By Sec. 13 (*b*), failure to file the claim within such period is not a bar to the right unless objection thereto is made at the first hearing (Appendix, p. 34). Sec. 13 (*c*) and (*d*) provide for other contingencies enlarging the time for filing claims (Appendix, p. 34). But Code D. C., Section 1302, requires that all actions for negligence causing death "shall be brought * * * within one year after the death of the party injured" (Appendix, p. 41). It is not only possible, but probable, that claims for death benefit under the Compensation Act may be filed at such time, or the procedure in the Compensation Commission or courts be so delayed, that an award of death benefit, "assigning to the employer all right of the person entitled to compensation," can not be entered within one year after death of the party injured. See *Great*

Lakes Dredge & Dock Co. et al. v. *Brown, etc.* (D. C. Ill.) 47 F. (2d) 265. If the Compensation Act and death statute must be construed together, as held by the courts below, the result would be that the employer and carrier take a right of action by assignment under the Compensation Act upon entry of an award, which right had ceased to exist prior thereto because the action to recover damages was not instituted within the time limited by the death statute.

(2) *Causes of Action are Different:* Code D. C., Section 1301 (Appendix, p. 40), creates a right of action on behalf of the widow and next of kin of the decedent. *Southern Railway Co.* v. *Hawkins,* 35 App. D. C., 313. Sec. 33 (*a*) of the Compensation Act creates a right of action in the "person entitled to compensation" as determined by Sec. 9. If the two statutes must be construed together, a question which would necessarily arise would be: "What right has a widow *as such* to assign under Code D. C., Section 1301?" The answer would be, "None!" The situation then is that Sec. 33 (*a*) (*b*) of the Compensation Act provides for assignment of an action which does not exist.

Other questions must necessarily arise from construing the statutes together. Shall the personal representative institute the action under Code D. C. 1301-2-3, at all events, within the year limited by that statute? Does the beginning of such action by the personal representative constitute an "election" affecting the right of the widow to compensation? May the widow, by first signifying her election to take compensation, affect the right of the personal representa-

tive to bring his action, if any such right exists? *Moore* v. *Christienson S. S. Co.* (*supra*).

(3) *Beneficiaries are Different:* Code D. C., Section 1301, creates a cause of action, and damages are assessed, for the benefit of the widow and next of kin of the decedent. Compensation Act, Sec. 9, creates death benefit in behalf of persons who may be different from those designated in the death statute (Appendix, pp. 31-33).

Compensation Act, Sec. 44, requires employer and carrier to pay $1,000. into a rehabilitation fund for designated purposes in cases where it is determined that there is no person entitled to compensation within the meaning of the Act (Appendix, p. 39). By Sec. 33 (*c*), payment into the fund operates "as an assignment to the employer of all right of the legal representative of the deceased * * * to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election" (Appendix, p. 37). But it has been held by the Court of Appeals of the District of Columbia in *Neubeck* v. *Lynch*, 37 App. D. C. 576, 581, that in actions to recover for negligence causing death it must be alleged and proved that there are dependent next of kin. If death statute and Compensation Act must be construed together, the right of action accruing to employer and carrier under Sec. 33 (*c*) of the Act would be unenforceable because it would be impossible to allege or prove the existence of any beneficiary within the meaning of the Compensation Act.

(4) *Damages are Different:* Code D. C., Section 1301, limits the amount of recovery to $10,000. There

is no suggestion of limitation of amount in the Compensation Act. A limitation of $10,000. on the amount recoverable under the death statute would defeat the express provisions of Sec. 33 (*e*) which provides that employer and carrier may retain their expenditures and the computed value of future instalments, and pay the excess thereover to the personal representative.

It may be argued that the employer and carrier take by the assignment under Sec. 33 (*b*) only the interest of the widow in the damages allowed under Code D. C., Section 1301. In most cases the widow's interest would be only one-third or one-half of the damages recovered, in accordance with the District of Columbia statute of distribution (Code D. C., Section 1303). The result would be, with maximum damages limited by the death statute to $10,000. that Congress has provided for a distribution under Sec. 33 (*e*) which could rarely be fulfilled.

(5) *Distribution of Damages is Different:* Code D. C., Section 1303, provides that damages recovered shall inure to the benefit of the family of the decedent and be distributed according to the provisions of the statute of distribution in force in the District of Columbia (Appendix, p. 41). Under that statute, a widow, there being no children, could not take more than one-half of the amount recovered under the death statute. In no event could she receive more than $5,000. one-half of the maximum amount of $10,000. limited by Section 1301. But Compensation Act, Secs. 9 and 14 (*m*), provide for death benefit to the widow in an amount which may equal $7,500.

There may also be next of kin entitled to share in a distribution under Sec. 1303 of the death statute who would have no rights under the Compensation Act (Compare Compensation Act, Sec. 9 (*b*) (*c*) (*d*) (*g*), Appendix, pp. 31, 33). *Moore* v. *Christienson S. S. Co.*, (*supra*).

Seemingly, the only logical conclusion which can be drawn, in view of the inconsistencies in the statutes, is that each is self-sufficient, and that in cases arising under the Compensation Act, that Act has exhausted the field and left nothing for the death statute to operate upon.

3.

For Whose Benefit and In What Form May the Action Be Maintained?

The Rules of the Supreme Court of the District of Columbia govern the form of action in the case at bar and designate who must or may be made parties herein (see Rules, Appendix, p. 41). These rules have the force of law. *Judd & Detweiler* v. *Gittings*, 43 App. D. C. 304, 311; *Murphy* v. *Gould*, 39 App. D. C. 363, 367. Equity Rule 13—expressly made applicable to actions at law—provides that:

> "Every action shall be prosecuted in the name of the real party in interest, but * * * (*a*) trustee of an express trust, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the

> action and in obtaining the relief demanded may join as plaintiffs * * *" (Appendix, p. 41).

Ætna Life Insurance Company, carrier paying the death benefit, is a real party in interest and may maintain an action in its own right to recover its loss from the wrongdoer. The *Kokusai Kisen Kabushiki Kaisha* (D. C. Texas), 44 F. (2d) 659, 51 F. (2d) 599; *Travelers' Ins. Co.* v. *Great Lakes Engineering Works Co., supra,* p. 24; *Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.* (D. C. Idaho), 45 F. (2d) 885; *City of Red Wing* v. *Eichinger,* 163 Minn. 54.

Anna Roberts, widow, as the person awarded death benefit, has a real interest in the proceeding. She is the statutory *cestui que trust* for whom a portion of any excess of recovery will be held in trust for the payment of future instalments. (*Compensation Act,* Sec. 33(*e*) (1) (C)). She is a proper use plaintiff. *Stackpole* v. *Pacific Gas and Electric Co.,* 181 Cal. 700; *Bassot et al.* v. *United Railroads of San Francisco,* 39 Cal. App. 60, 177 Pac. 884.

Anna Roberts, administratrix of the estate of Henry Roberts, deceased, has a real interest in the action. As personal representative she will take any excess of damages recovered, after deduction of the amounts having preferential claim (*Compensation Act,* Sec. 33 (*e*) (1) (C) and Sec. 33 (*e*) (2)). In this capacity she is also a proper use plaintiff.

Harry M. Bralove, employer, has a direct but contingent liability for death benefit awarded. His right to proceed against the wrongdoer, such as it may be,

has been assigned to the insurance carrier assuming his liability and paying the award. He may and should sue as assignor to the use of the Insurance Company, his assignee.

See also *McKenzie* v. *Missouri Stables* (Mo.), 34 S. W. (2d) 136.

It has been held, upon objections identical with those raised by the defendant herein, that the technical niceties of common law pleading and the provisions of death statutes as to the form of titling do not apply to cases arising under compensation acts. *Clough & Molloy* v. *Shilling,* 149 Md. 189. For variation in the manner of pleading parties plaintiff in death actions similar to that here presented, see *Maryland Casualty Co. et al.* v. *Union Bridge Electric Mfg. Co.,* 145 Md. 644; *State Accident Fund* v. *N. Y., P. & N. R. Co.,* 141 Md. 305; *Bethlehem Steel Co.* v. *Raymond Concrete Pile Co.,* 141 Md. 67; *Kaufman* v. *United Railways & Electric Co.,* 135 Md. 524.

CONCLUSION.

Under a practical application of the Compensation Act and the rules of court, and in the light of the cases cited, it is submitted that the declaration presents no misjoinder of causes of action, and joins as parties plaintiff only those whose interests could be affected by the verdict and judgment. The judgment of the Court of Appeals should be reversed.

Respectfully,

CHARLES W. ARTH,
LEONARD J. GANSE,
Counsel for Petitioners.

APPENDIX.

Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1924).

* * * * * * *

DEFINITIONS.

SEC. 2. When used in this Act—

* * * * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Act of May 17, 1928, C. 612, 45 Stat. 600:

* * * in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

* * * * * * *

LIABILITY FOR COMPENSATION.

SEC. 4(*a*). Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. * * *

(*b*) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * * * *

EXCLUSIVENESS OF LIABILITY.

SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

MEDICAL SERVICES AND SUPPLIES.

SEC. 7(*a*). The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require. * * *

COMPENSATION FOR DEATH.

SEC. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * * * *

(*b*) If there be a surviving wife or dependent husband and no child of the deceased under the age of

eighteen years, to such wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowhood with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased under the age of eighteen years, the additional amount of 10 per centum of such wages for each such child until the age of eighteen years; in case of the death or remarriage of such surviving wife or dependent husband any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to 15 per centum of such wage, and the same shall be payable until he shall reach the age of eighteen years: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(*c*) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then for the support of each such child under the age of eighteen years, 15 per centum of the wages of the deceased: *Provided,* That the aggregate shall in no case exceed 66⅔ per centum of such wages.

(*d*) If there be no surviving wife or dependent husband or child under the age of eighteen years or if the amount payable to a surviving wife or dependent husband and to children under the age of eighteen years shall be less in the aggregate than 66⅔ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent

upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person until the age of eighteen years and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66⅔ per centum of such wages, and the amount payable as hereinbefore provided to the surviving wife or dependent husband and for the support of surviving child or children.

* * * * * * *

(*g*) Aliens: Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future instalments of compensation as determined by the commission.

* * * * * * *

TIME FOR FILING OF CLAIMS.

Sec. 13 (*a*) The right to compensation for disability under this Act shall be barred unless a claim therefor

is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(*b*) Notwithstanding the provisions of subdivision (*a*) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(*c*) If a person who is entitled to compensation under this Act is mentally incompetent or a minor, the provisions of subdivision (*a*) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(*d*) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (*a*) shall begin to run only from the date of termination of such suit.

* * * * * * *

PAYMENT OF COMPENSATION.

Sec. 14 * * *

(*m*) The total compensation payable under this Act for injury or death shall in no event exceed the sum of $7,500.

* * * * * * *

COMPENSATION A LIEN AGAINST ASSETS.

Sec. 17. Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise.

* * * * * * *

SECURITY FOR COMPENSATION.

Sec. 32 (*a*) Every employer shall secure the payment of compensation under this Act—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the commission, to insure payment of compensation under this Act; or

(2) By furnishing satisfactory proof to the commission of his financial ability to pay such compensation and receiving an authorization from the commission to pay such compensation directly. The commission may, as a condition to such authorization, require such employer to deposit in a depository designated by the commission either an indemnity bond or securities (at the option of the employer) of a kind and in an

amount determined by the commission, and subject to such conditions as the commission may prescribe, which shall include authorization to the commission in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(*b*) In granting authorization to any carrier to insure payment of compensation under this Act the commission may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this Act in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this Act. The commission may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No suspension or revocation shall affect the liability of any carrier already incurred.

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

SEC. 33. (*a*) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in dam-

ages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(*b*) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(*c*) The payment of such compensation into the fund established in Section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(*d*) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(*e*) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under Section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation,

such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

SUBSTITUTION OF CARRIER FOR EMPLOYER.

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the commission shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES.

SEC. 36. (*a*) Every policy or contract of insurance issued under authority of this Act shall contain (1) a

provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

(*b*) No contract or policy of insurance issued by a carrier under this Act shall be canceled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the deputy commissioner and to the employer in accordance with the provisions of subdivision (*c*) of section 12.

* * * * * * *

SPECIAL FUND.

SEC. 44. (*a*) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (*f*) and (*g*) of section 8 of this Act. Such fund shall be administered by the commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(*b*) The Treasurer is authorized to disburse moneys from such fund only upon order of the commission.

* * * * * * *

(*c*) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer

resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (*f*) of section 8, and 50 per centum shall be available for payments under subdivision (*g*) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

Code D. C. 1924, Chapter Forty-five.

NEGLIGENCE CAUSING DEATH.

SEC. 1301. LIABILITY.—Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person; *Provided,* That in no case shall the recovery under this act exceed the sum of ten thousand dollars: *And provided further,* That no action shall be maintained under this chapter in any case when the party in-

jured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

SEC. 1302. BY WHOM SUIT TO BE BROUGHT.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

SEC. 1303. DISTRIBUTION OF DAMAGES.—The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia.

Rules of Court.

Supreme Court of the District of Columbia, 1929:

LAW RULES.

The law rules shall apply in equity, and the equity rules shall apply at law, unless inconsistent with the rules prescribed.

EQUITY RULES.

The equity rules shall apply at law and the law rules shall apply in equity unless inconsistent with the rules prescribed.

13.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but (*a*) * * * trustee of an express trust, * * * or a party expressly author-

ized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the case. Persons having a united interest may be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of the propriety of the main proceeding.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No. 137.

Aetna Life Insurance Company, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners*,

vs.

Samuel D. Moses, an Individual, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

H. Clay Espey,
Attorney for Respondent.

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IN THE

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October Term, 1932.

No. 137.

Aetna Life Insurance Company, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners*,

vs.

Samuel D. Moses, an Individual, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion filed in the cause in the Supreme Court of the District of Columbia (R. 17) is not reported.

The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 24), and is reported in 57 F. (2d) 440.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered March 7, 1392 (R. 31). The petition for a writ of certiorari was filed June 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Who are the proper party or parties plaintiff in an action brought in the District of Columbia against a third party whose negligence caused the death of an employee whose widow accepted compensation in accordance with the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. at Large 1424; made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600)?

Statement.

The petitioners in their petition (pages 2 to 5) have correctly detailed the statement of the case, and in that connection it is thought necessary only to call attention to the fact that this statement says that this case involves the construction and interpretation of Section 33 (a) (b) (d) and (e) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424) (quoted on page 39 of the appendix to petitioners' brief) as applied for the purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). It is the contention of the respondent that this case also involves the construction and interpretation of the District of Columbia "Lord Campbell's Act"

as provided in Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303 (quoted on page 42 of the appendix to petitioners' brief), as well as the construction and interpretation of the District of Columbia Workmen's Compensation Act.

Attention is also called to the fact that the Supreme Court of the District of Columbia, in sustaining the motion of the defendant (respondent herein), to strike out the declaration of the plaintiffs (petitioners herein), granted leave to the plaintiffs to amend within twenty days (R. 18), and that the plaintiffs did not take advantage of this permission.

For the purpose of clarity, we shall hereafter refer to the petitioners as plaintiffs and to the respondent as defendant.

ARGUMENT.

I.

The question here presented is of minor importance as it involves merely a formal matter of pleading in the Supreme Court of the District of Columbia, and does not affect the substantive rights of the parties. The defendant, by his motion to strike out the declaration for misjoinder of parties plaintiff, did not deny a cause of action against him, but merely that the pleading was not in proper form. The defendant did not deny that any of the plaintiffs had a beneficial interest in the cause of action against him. As far as the substantive rights of the parties are concerned, it is immaterial in whose name the suit is brought. At common law, even though an assignee had to sue in the name of the assignor, the assignee had the beneficial and equitable ownership of the cause of action, and could control the suit absolutely. *Welch* v. *Mandeville,* 1 Wheat.

233, 4 L. Ed. 79; *Irvine* v. *Lowry,* 14 Peters 293, 10 L. Ed. 462; *Karrick* v. *Wetmore,* 22 App. D. C. 487.

The trial court decided merely that the common law rule applied in this case and held among other things that neither the Aetna Life Insurance Company nor Harry M. Bralove could be legal parties plaintiff. The plaintiffs were given twenty days to amend the declaration. They refused, however, to avail themselves of this privilege, electing to stand on their declaration.

II.

The District of Columbia Compensation Act does not create a new cause of action at law against third persons whose negligence causes the death of another. Prior to the Compensation Act, the only cause of action for wrongful death was under the District of Columbia "Lord Campbell's Act", Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303, (quoted on page 42 of the appendix to plaintiffs' brief) except under the Employers' Liability Act which is not applicable to the present case. There is no language in the Compensation Act expressly creating a new cause of action. The fact that there are inconsistencies between the Compensation Act and the "Lord Campbell's Act" does not, as plaintiffs contend, create a new cause of action. If the Compensation Act creates a new cause of action for the death of an employee who is covered by workmen's compensation, caused by the negligence of a third person, then the latter would be subjected to double liability. Congress did not intend such a result. The Compensation Act was intended primarily to regulate the rights and duties between employer and employee, and not those of strangers to the employment. *Silvia* v. *Scotten,* 32 Del. 295, 299; 122 A. 513.

Both the Compensation Act and the "Lord Campbell's Act" must be construed strictly as they are in derogation

of the common law. *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648, 655, 59 L. Ed. 1160; *Ross* v. *Jones*, 89 U. S. 576, 591, 22 L. Ed. 730; *Brunswick Terminal Co.* v. *National Bank*, 192 U. S. 386, 390, 48 L. Ed. 491.

III.

Under "Lord Campbell's Act", the only person who may bring suit is a personal representative of the deceased. The personal representative of the deceased is the executor or administrator and none other. *Fleming* v. *Capital Traction Co.*, 40 App. D. C. 489; *Ferguson* v. *Railway Co.*, 6 App. D. C. 525.

In the case of *Luckey* v. *Union Pacific R. Co.*, 117 Nebr. 85, 219 N. W. 802, decided under statutes very similar to those in this jurisdiction, the court held that an action similar to that of the instant case should be brought in the name of decedent's personal representative.

IV.

Harry M. Bralove is not a proper legal party plaintiff. The Compensation Act, Sec. 33b, assigns to Bralove "all right of the person entitled to compensation". In this case, this right is merely the distributive share to which "the person entitled to compensation" is entitled under "Lord Campbell's Act". As the personal representative, and not one of those entitled to a distributive share under the death statute, is the only proper legal plaintiff under "Lord Campbell's Act", the employer Bralove could not acquire a greater right than his statutory assignor.

Even if it be held that the Compensation Act assigned the entire right of the personal representative of the deceased to Bralove, Bralove would not be entitled to sue in his own name, as the Compensation Act fails to give the

employer such express authorization. At common law, an assignee may not sue in his own name without special statutory authority. *Glenn* v. *Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Taylor* v. *Anderson*, 275 U. S. 431, 72 L. Ed. 354; *Met. Coach Co.* v. *Freund*, 42 App. D. C. 283; *The Com. Nat'l Bank* v. *Consumers' Brewing Co.*, 16 App. D. C. 186; *Armstrong, Whitworth & Co.* v. *Norton*, 15 App. D. C. 223.

The common law in this respect applies in the District of Columbia, and has been changed to permit an assignee to sue in his own name only in the case of an assignment of a judgment or of certain contract claims. Code D. C. 1924, c. 11, Secs. 431, 432, 433, and 434.

V.

The Aetna Life Insurance Company is not a proper legal party plaintiff. Although the Compensation Act does make some sort of an assignment to the employer, it makes none whatever to the insurance carrier. "Employer" and "carrier" are not interchangeable, as the plaintiffs contend. The Compensation Act does not expressly make them so, as do compensation acts in some states. It is significant that Section 35 of the Compensation Act (quoted on page 40 of the appendix to the plaintiffs' brief), in imposing the duties of the employer upon the insurance carrier, makes no mention of conferring the rights of the employer upon the carrier. The plaintiffs' argument, on page 16 of their brief, that "employer" and "carrier" are synonymous because the Compensation Act does not make them mutually exclusive, is obviously fallacious.

The Aetna Life Insurance Company is not a proper legal party plaintiff as assignee under the provisions of Bralove's Workmen's Compensation Insurance Policy with the Aetna Life Insurance Company because under the common

law, as still applied in the District of Columbia, an assignee is not a proper legal party plaintiff. *Glenn* v. *Marbury, supra.*

The Aetna Life Insurance Company is not a proper legal party plaintiff as indemnitor of the employer Bralove under the latter's Workmen's Compensation Insurance Policy with the former. *St. Louis, I. M. & S. R. Co.* v. *Com. Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Southern Railway Co.* v. *Blunt & Ward*, 165 Fed. 258, 260.

These cases show that while an insurance company, subrogated to the rights of the insured, may bring suit in its own name as legal plaintiff in equity or in admiralty, the common law rule applied in Federal Courts in actions at law is that the insurance company must not name itself as legal party plaintiff in such subrogation action. Only where statute permits, may an insurance company bring such an action in its own name in a law court, as in the case of *Travelers' Ins. Co.* v. *Engineering Works*, cited on p. 18 of the plaintiffs' brief, where an Ohio statute permitting suit to be brought in the name of the real party in interest, was held to abrogate the old common law rule. The cases of *Kokusai Kisen Kabushiki Kaisha*, 44 F. (2d) 659, and of the *Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, cited by the plaintiffs, were both correctly decided because it has long been the rule in admiralty that the equitable owner of a chose in action or the assignee of a chose in action may bring suit in his own name without naming the legal owner of a chose in action as a nominal plaintiff. *St. Louis, I. M. & S. R. Co.* v. *Com. Ins. Co., supra; The Propellor Monticello* v. *Mollison*, 17 How. 153, 15 L. Ed. 68; *The Liberty No. 4*, 7 Fed. 226.

The Aetna Life Insurance Company is not a proper legal party plaintiff under District of Columbia Supreme Court Equity Rule 13 (cited on p. 30 of the plaintiffs' brief) as real party in interest because this rule merely states a long

established rule of equity procedure in force in the District of Columbia even before assignees of contract claims could sue in their own name at law. *Young* v. *Kelly*, 3 App. D. C. 296.

Decisions of the courts of other jurisdictions are of little help in construing the District of Columbia statutes because the compensation statutes or rules relating to suits by assignees generally vary from state to state. Where insurance carriers or employers are permitted to sue in their own names the third parties whose negligence has caused the death of the employees, the state statute expressly permits such procedure. *Silvia* v. *Scotten, supra; Mass. Bonding & Ins. Co.* v. *San Francisco Oakland Terminal Railways*, 39 Cal. App. 388, 178 Pac. 974.

VI.

Neither Anna Roberts, as an individual, nor the Aetna Life Insurance Company is a proper use plaintiff. The only right of Anna Roberts is her portion of the distributive share of any excess of the recovery over $7,500.00 against the defendant. Under "Lord Campbell's Act" and decisions construing it, one entitled to merely a distributive share is not a proper party plaintiff, either legal or use. The fact that Anna Roberts has a possible interest would not entitle her to be a use plaintiff under District of Columbia Supreme Court Equity Rule 13 (cited on pages 30 and 44 of plaintiffs' brief) because this rule merely applies a long established rule of equity practice which would not override the clear terms of a statute applying only to a law action. The Aetna Life Insurance Company is not a proper use plaintiff because an unliquidated tort claim may not be assigned in the District of Columbia. *Lamont* v. *Wash. & Georgetown Railroad Co.*, 2 Mackey 502, 47 A. R. 268.

CONCLUSION.

If any plaintiffs, legal or use, were improperly joined, the lower courts did not err in sustaining the defendant's motion to strike out the declaration for misjoinder of plaintiffs.

No question of merit is presented by the petitioners, and the petition for the writ of certiorari should be denied.

Respectfully submitted,

H. CLAY ESPEY,
Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No. 137.

AETNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners*,

vs.

SAMUEL D. MOSES, an Individual, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

MERRITT U. HAYDEN,
SEFTON DARR,
H. CLAY ESPEY,
GEORGE MONK,
JAMES O'D. MORAN,
Attorneys for Respondent.

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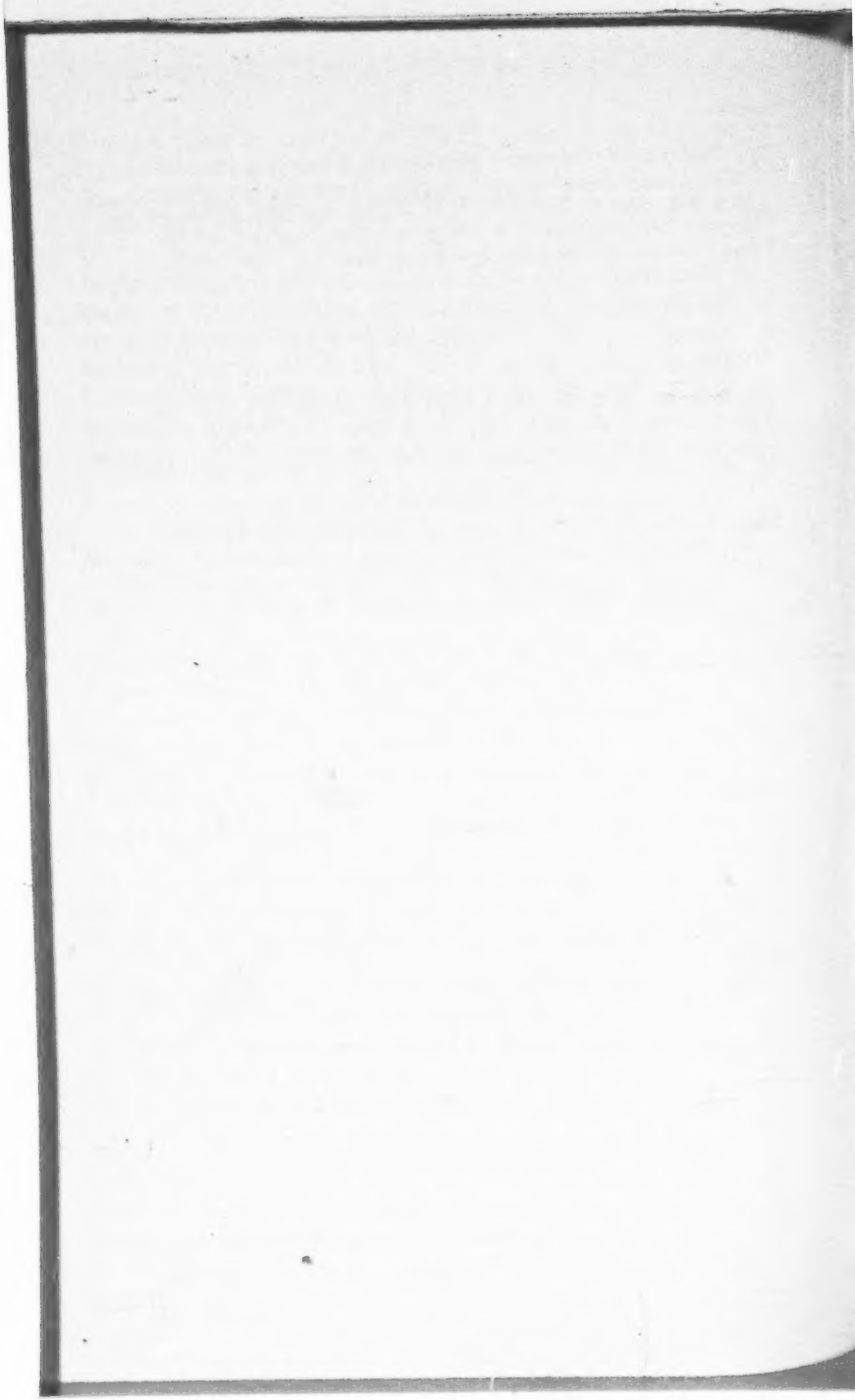

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No 137.

AETNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners,*

vs.

SAMUEL D. MOSES, an Individual, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The memorandum opinion filed in the cause in the Supreme Court of the District of Columbia (R. 16) is not reported.

The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 22), and is reported in 57 F. (2d) 440.

JURISDICTION.

The judgment of the Court of Appeals of the District of Columbia was entered March 7, 1932 (R. 28). The petition for a writ of certiorari was filed June 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Who are the proper party or parties plaintiff in an action brought in the District of Columbia against a third party whose negligence caused the death of an employee whose widow accepted compensation in accordance with the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. at Large 1424; made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600)?

STATUTES INVOLVED.

The statutes involved are set out in the Appendix (infra, pages 20 to 22).

STATEMENT.

The petitioners in their brief have correctly detailed the statement of the case, and in that connection it is thought necessary only to call attention to the fact that this statement says that this case involves the construction and interpretation of Section 33 (a) (b) (d) and (e) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424) as applied for the purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). It is the contention of the respondent that this case also involves the construction and interpretation of the District of Columbia's "Lord Campbell's Act" as provided in Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303, as well as the construction and interpretation of the District of Columbia's Workmen's Compensation Act.

Attention is also called to the fact that the Supreme Court of the District of Columbia, in sustaining the motion of the defendant (respondent herein) to strike out the declaration of the plaintiffs (petitioners herein), granted leave

to the plaintiffs to amend within twenty days (R. 17), and that the plaintiffs did not take advantage of this permission.

For the purpose of clarity, we shall hereafter refer to the petitioners as plaintiffs and to the respondent as defendant.

SUMMARY OF ARGUMENT.

I. The question here presented involves merely a formal matter of pleading, and does not affect the substantive rights of the parties. Whether or not an assignee of a chose in action may be a legal party plaintiff does not affect his substantive rights in the least. The rights of the plaintiffs were not prejudiced because as the trial court gave the plaintiffs leave to amend, they could have done so by naming the proper parties plaintiff, and proceeded with the cause.

II. The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence caused the death of another. A new cause of action for wrongful death of an employee against a stranger to the employment is not created by the District of Columbia's Workmen's Compensation Act.

III. Harry M. Bralove, employer, and Aetna Life Insurance Company are not proper legal parties plaintiff. Although under the District of Columbia's Workmen's Compensation Act, Harry M. Bralove as employer is a statutory assignee, he is not a proper legal party plaintiff, as an assignee may not sue in his own name without special statutory authority. Aetna Life Insurance Company is not a proper legal party plaintiff as assignee under the subrogation clause in the insurance policy for the same reason, and also because both an unliquidated tort claim for dam-

ages and an action for wrongful death are unassignable without special statutory authority.

IV. Anna Roberts, individual, is not a proper use plaintiff because the District of Columbia's "Lord Campbell's Act" permits only the personal representative to be a party plaintiff in an action under it. The Aetna Life Insurance Company is not a proper use plaintiff because the cause of action, attempted to be assigned, is unassignable.

V. The instant case is not in conflict with decisions in other federal courts because it is evident that federal courts all hold that at common law an insurance company as indemnitor or as assignee is not a proper legal party plaintiff. Moreover, it is possible for other courts to reach other conclusions because the law of the forum governs as to whether an assignee may sue in his own name or not.

VI. The administratrix of the deceased employee should be the only proper legal party plaintiff, and the employer Harry M. Bralove may be the only use party plaintiff. "Lord Campbell's Act" provides a right of action for death caused by wrongful act of another, and names personal representative as proper person to sue. The District of Columbia's Workmen's Compensation Act assigns part or all of this cause to the employer of the deceased employee, but fails to give him the right to sue in his own name. Therefore, the personal representative is the only proper legal plaintiff, and the employer might be the only proper use plaintiff.

ARGUMENT.

I.

The question here presented is of minor importance as it involves merely a formal matter of pleading in the Supreme Court of the District of Columbia, and does not affect the substantive rights of the parties.

It is the defendant's contention that this suit is brought under the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03) as modified by section 33 of the District of Columbia's Workmen's Compensation Act. Section 33 (b) of the District of Columbia's Workmen's Compensation Act provides: "Acceptance of such compensation shall operate as an assignment to the employer of *all right of the person entitled to compensation to recover damages against such person.*" (Italics supplied).

Paragraph "c" of the same section has no application to the present case because it provides what shall happen in the event of payment into a fund established by another section of the Compensation Act.

The italicisized quotation from the Compensation Act makes it clear that the employer, as assignee, receives the same right as the person entitled to compensation had. The Compensation Act does not set up any new cause of action in any one. The inquiry is, then, what right has the "person entitled to compensation". No right existed at common law, but the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03) conferred a right to sue for death by wrongful act, specifically described the person entitled to bring suit, and specifically set the limit of recovery at $10,000.00. The Workmen's Compensation Act has not changed this right, except that it assigns the right of the "person entitled to compensation" to the employer.

From the wording of the Workmen's Compensation Act, it is not quite clear whether Congress intended to assign only the distributive share of the "person entitled to compensation" or the entire amount recoverable by the personal representative of the deceased. This question, however, is not raised in the present case. The plaintiffs have appealed from an order sustaining a motion to strike out the declaration, the ground of which motion was, in substance, misjoinder of plaintiffs. The two legal plaintiffs, namely, Aetna Life Insurance Company and Harry M. Bralove, are entitled to bring suit under any theory as assignees only. Whether an assignee may sue in his own name or not is merely a question of form. The fact that the assignee of a chose in action is not a legal plaintiff does not affect his substantive rights. At common law, the legal title to a chose in action was in the assignor, and suit was filed in his name as a legal plaintiff, even though the assignee had a complete beneficial ownership and could completely control the action. *Welch* v. *Mandeville,* 1 Wheat. 233, 4 L. Ed. 79; *Irvine* v. *Lowery,* 14 Peters 293, 10 L. Ed. 462; *Karrick* v. *Wetmore,* 22 App. D. C. 487.

In sustaining the motion to strike out, the lower court gave the plaintiffs leave to amend within twenty days (R. 17). The plaintiffs could have amended the declaration by naming the proper parties, and proceeded with the action without prejudice to the rights of any assignee or beneficial owner of the cause of action. The plaintiffs, however, elected to stand on their declaration.

II.

The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence has caused the death of the deceased.

The only action at law for a wrongful death occurring in the District of Columbia is provided in the District of Columbia's "Lord Campbell's Act", Code D. C. 1924, c. 45,

secs. 1301-03 (with the exception of the Employers' Liability Act which is not applicable here because it applies only to common carriers). The "Lord Campbell's Act" specifically provides that suit shall be brought by and in the name of the personal representative of the deceased. The personal representative of the deceased has been held to be the executor or administrator of the deceased, and no other. *Fleming* v. *Capital Traction Co.*, 40 App. D. C. 489; *Ferguson* v. *Railroad Co.*, 6 App. D. C. 525.

The plaintiffs contend that section 33 of the District of Columbia's Workmen's Compensation Act creates a new cause of action at law for wrongful death. *Hyde* v. *Southern Railway*, 31 App. D. C. 466, cited by plaintiffs to sustain this contention, is no authority. The statute involved in that case was an Employers' Liability Act which provided, as quoted on page 468 of the opinion: "That every common carrier . . . shall be liable to any of its employees, or, in case of his death, to his personal representative, . . . for all damages which may result from the negligence of any of its officers . . . ". This language clearly created a new cause of action. There is no language in the District of Columbia's Workmen's Compensation Act creating any new liability in a person not standing in the relation of employer to the deceased.

The mere fact that "Lord Campbell's Act" and the Workmen's Compensation Act seem inconsistent in places, is not material. The Compensation Act was designed principally to afford an adjustment of the rights and obligations of employers and employees, principally the latter; it was not intended to disturb the liabilities of strangers to the employment. *Silvia* v. *Scotten*, 32 Del. 295, 299, 122 Atl. 513. It would be far-fetched to hold that in view of the inconsistencies, a new cause of action arises against a negligent stranger to the employment for the reimbursement of the employer and his insurance carrier, where there is absolutely no language in the Compensation Act creating such new cause of action.

If, as plaintiffs contend, the Compensation Act creates a new cause of action against a third person who negligently kills an employee covered by the Compensation Act, then such third person would be subjected to a double liability for such wrongful death: (1) under the Compensation Act; and (2) under "Lord Campbell's Act". It is not likely that Congress intended such a result.

The plaintiffs' claim of damages in this suit is $10,000.00. The plaintiff Aetna Life Insurance Company is not able to sue for $10,000.00 as the limit of its liability is $7,500.00, nor would the plaintiff Harry M. Bralove have the right to sue for $10,000.00 as the limit of his liability is the same as that of the insurance company. Section 14 (m) of the District of Columbia's Workmen's Compensation Act. There is, therefore, an excess of $2,500.00, and, in order to recover for that, the plaintiffs must rely upon the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03). Consequently, the suit is apparently brought under "Lord Campbell's Act" as modified by the Workmens' Compensation Act. "Lord Campbell's Act" is complete in itself, for it provides for a definite limit of recovery, provides for the plaintiff who shall bring the suit, and provides for the distribution of the verdict. The Workmen's Compensation Act could not, even by its expressed terms, authorize a suit for more than $7,500.00. "Lord Campbell's Act" is, therefore, involved in this suit and must be considered in determining the questions raised.

III.

Harry M. Bralove, employer, and Aetna Life Insurance Company, the insurance carrier, are not proper legal parties plaintiff in this action.

As, in any event, the liability of the defendant is based either upon the Workmen's Compensation Act or upon "Lord Campbell's Act", or both, the defendant's liability

is entirely statutory, and is not based upon the common law. The defendant's liability is, therefore, subject to the principle that statutes in derogation of the common law are to be construed strictly. *St. Louis, I. M. & S. R. Co.* v. *Craft,* 237 U. S. 648, 655, 59 L. Ed. 1160; *Ross* v. *Jones,* 89 U. S. 576, 591, 22 L. Ed. 730; *Brunswick Terminal Co.* v. *National Bank,* 192 U. S. 386, 390, 48 L. Ed. 491.

In *St. Louis, I. M. & S. R. Co.* v. *Craft, supra,* the court said on page 655: "By the common law, the death of a human being, although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured . . . . Therefore, in cases like this, the right of recovery depends entirely upon statute law."

Although the Workmen's Compensation Act assigns to the plaintiff employer, Harry M. Bralove, the right of the person entitled to compensation, it nowhere gives him express authority to bring a suit in his own name. He is, therefore, not a proper legal plaintiff, because an assignee may not sue in his own name without special statutory authority. *Glenn* v. *Marbury,* 145 U. S. 499, 36 L. Ed. 790; *Taylor* v. *Anderson,* 275 U. S. 431, 72 L. Ed. 354; *Metropolitan Coach Co.* v. *Freund,* 42 App. D. C. 283; *Commercial National Bank* v. *Consumers' Brewing Co.,* 16 App. D. C. 186; *Armstrong, Witworth & Co.* v. *Norton,* 15 App. D. C. 223.

In *Glenn* v. *Marbury, supra,* at page 509, the court said:

> "a chose in action is not assignable so as to authorize the assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where the suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia."

The common law on this subject has been changed in the District of Columbia only to permit the assignee to sue in his own name where a judgment or certain contract actions

are assigned. Unliquidated tort claims are unmentioned. This was done by Act of Congress on March 3, 1901, Code D. C. 1924, c. 11, secs. 431-434.

In view of the principle stated above, the Aetna Life Insurance Company also is not a proper legal plaintiff. The Compensation Act does make an assignment to the employer, but it makes no assignment to the insurance carrier. The plaintiffs contend that there is a statutory assignment to the insurance carrier on the ground that "employer" and "carrier" are used synonymously. The Compensation Act nowhere expressly states that these terms are interchangeable as do compensation acts in some states. It is significant that section 35 of the District of Columbia's Workmen's Compensation Act, in imposing the obligations of the employer on the carrier, does not confer the rights of the employer on the carrier. The employer, Harry M. Bralove, has at best an unliquidated tort claim for damages against the defendant. Regardless of whether or not the Workmen's Compensation Act created a new cause of action, and whether or not the employer could assign his claim to the insurance carrier, the assignment to the Aetna Life Insurance Company by virtue of the subrogation clause in the insurance policy of Harry M. Bralove with the Aetna Life Insurance Company would not permit the Aetna Life Insurance Company to sue in its own name without special statutory authority. *Glenn* v. *Marbury, supra.*

Moreover, Bralove's unliquidated tort claim for damages resulting from personal injuries could not be transferred to the Aetna Life Insurance Company, as it has long been the rule in the District of Columbia that an action for personal injuries is not assignable. *Lamont* v. *Washington & Georgetown Railroad Co.*, 2 Mackey 502, 47 A. R. 268.

Even if, as the plaintiffs contend, a new cause of action is created by the Workmen's Compensation Act, it is none the less a cause of action for death wrongfully caused by

another. In the absence of statute, an action for wrongful death is not assignable. *Southern Pa. Co.* v. *Winton,* 27 Tex. Civ. App. 503, 66 S. W. 477; *Marsh* v. *W. N. Y. & P. Railway Co.,* 204 Pa. 229, 53 Atl. 1001.

Therefore, the employer Bralove's claim against the defendant is not assignable; and if it were, the Aetna Life Insurance Company would not be entitled to sue in its own name.

Neither the employer Bralove nor the Aetna Life Insurance Company may be a proper legal plaintiff under District of Columbia Supreme Court Equity Rule No. 13, which is to the effect that every action shall be prosecuted in the name of the real party in interest, and which rule is practically the same as Rule No. 37 of the Rules of Practice for the Courts of Equity of the United States. Equity Rule No. 13 merely states an established rule of equity practice, in force in the District of Columbia before even assignees of contract claims could sue in their own names at law. *Young* v. *Kelly* (1896), 3 App. D. C. 296. The statute permitting assignees of liquidated contract claims to sue in their own names (Code D. C. 1924, c. 11, secs. 431-434), was not enacted until 1901. Before this statute was passed, it was definitely established in the District of Columbia that no assignee could sue in his own name at law. *Glenn* v. *Marbury, supra.* It was certainly not the intention of the Supreme Court of the District of Columbia that Equity Rule No. 13 should apply to actions at law. To hold that all plaintiffs in the present case are properly joined by reason of Equity Rule No. 13 would be to revolutionize the present practice followed in the District of Columbia which is to the effect that an assignee cannot sue at law in his own name unless expressly permitted by statute, and further to the effect that an unliquidated tort claim cannot be assigned. If it had been the intention of the Supreme Court of the District of Columbia to make a rule permitting the real parties in interest or assignees to sue in their own names at law, that court would have done so by

expressly making a law rule to that effect, rather than by merely stating in written form as an equity rule an old established rule of equity practice. Certainly, the decision of the trial court in the present case is an indication of the District of Columbia Supreme Court's interpretation of Equity Rule No. 13 as applied to actions at law, and further is an indication of the practice followed in that court.

Moreover, it is doubtful whether the District of Columbia Supreme Court would have the power to make a rule permitting assignees of any nature and all parties having an interest in the subject of the action to join as plaintiffs in an action at law. It was absolutely well-established law in the District of Columbia before the statute passed in 1901 (Code D. C. 1924, c. 11, secs. 431-434), that no assignee could sue as a legal paintiff. By Act of Congress in 1901, assignees of judgments and of liquidated contract claims were expressly authorized to sue in their own name. This Act of Congress, by enumerating the types of claims that could be assigned, excluded by implication types of claims not enumerated. A rule of court cannot repeal a statute or regulate a matter already regulated by statute. *Hamilton* v. *Fowler,* 83 Fed. 321, 326; *Schnitzer* v. *Stein,* 96 Oregon 343, 189 Pac. 984. A rule of court cannot broaden a statute. *Nissen* v. *Flaherty,* 117 Maine 534, 105 Atl. 127. A rule of court cannot be in contravention of the common law or the law as declared in numerous decisions of the court. *DeLorme* v. *Pease,* 19 Georgia 220, 227; *Huff* v. *Shepperd,* 58 Mo. 242, 246.

It is, therefore, difficult to understand how a rule of the Supreme Court of the District of Columbia could extend the right to any kind of assignee to sue in his own name, or could permit any person who might benefit financially to be a party plaintiff in a suit for wrongful death under "Lord Campbell's Act".

Very few cases decided under compensation acts in other jurisdictions are authority for the propositions involved

in this case. Hardly any two compensation acts are alike. Cases decided under state compensation acts are decided under the language of such acts, which is generally different from that of the Workmen's Compensation Act of the District of Columbia, and also are decided under the established principles of law of each state. Wherever a state court permits an employer or insurance company to recover in its own name, the act makes provision accordingly. *Silvia* v. *Scotten, supra; Insurance Co.* v. *Railways,* 39 Cal. App. 388, 178 Pac. 974; *Henderson Tel. & Tel.* v. *Owensboro Home T. & T.,* 192 Ky. 322 (1921), 233 S. W. 743; *Texas and P. R. Co.* v. *Archer* (1918), Texas, 203 S. W. 796; *Jordan* v. *Orcutt* (1932), Mass., 181 N. E. 661.

IV.

Anna Roberts, individual, and Aetna Life Insurance Company are not proper use plaintiffs in this action.

The only possible interest that Anna Roberts can have as an individual is that she would be entitled to receive from herself as administratrix her distributive share of any recovery in excess of $7,500.00. In other words, her interest is that of one of the next kin of her deceased husband. Under the terms of the District of Columbia's "Lord Campbell's Act", and the decisions construing it, the personal representative is the only proper plaintiff in an action brought by virtue of this act. "Lord Campbell's Act" is remedial, and must be strictly construed, and, therefore, even if District of Columbia Supreme Court Equity Rule No. 13, which provides that any person having an interest in the subject of the action may be joined as a party to the action, is given full force and effect, yet the definite and clear terms of the statute will at once override the rule, and so far as the excess of damages over and above $7,500.00 is concerned, Anna Roberts, individually, has no

right or cause of action, and, therefore, cannot file a suit, or be joined as a party plaintiff, as at common law, she had no interest, and under the statute, the person to bring the suit for the benefit of the next of kin is clearly set forth.

The Aetna Life Insurance Company is not a proper use plaintiff either as an attempted assignee of an unliquidated tort claim for personal injuries, *Lamont* v. *Wash. & Georgetown Railroad Co., supra,* or as an attempted assignee of an action for wrongful death, *Southern Pa. Co.* v. *Winton, supra, Marsh* v. *W. N. Y. & P. Railway Co., supra.*

V.

The instant case is not in conflict with the Kokusai Kisen Kabushiki Kaisha, 44 Fed. (2d) 659, or with any other rule long settled in the Federal Courts.

It is the plaintiffs' contention that plaintiff Aetna Life Insurance Company takes a right of action as legal subrogee of the assured as indemnitor under the Workmen's Compensation Insurance Policy issued by it to plaintiff Harry M. Bralove, and that, therefore, the Aetna Life Insurance Company is a proper legal plaintiff. In the case of *Southern Railway Co.* v. *Blunt & Ward,* 165 Fed. 258, the court said on page 260:

> "It is a general rule of law that, where an insurer pays to the assured the total amount of the loss, such insurer is subrogated by operation of law to all of the assured's rights of action against third persons who are responsible for the loss. The insurer's title arises, or is derived, from the assured alone, and can only be enforced in the right of the latter. *In a court of common law, this right of subrogation can only be asserted in the name of the assured, but in a court of equity or admiralty, the insurer can prosecute the action against*

the third party in its own name or right." (Italics supplied).

The court further said on page 262: "If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone in the name of the railway company as the nominal plaintiff for the use of the insurance company."

Southern Railway Co. v. *Blunt & Ward, supra,* follows the rule expressed in *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co.,* 139 U. S. 223, 35 L. Ed. 154, where on page 235, the court said, in speaking of an insurance company's right of action as indemnitor: "By the strict rules of common law, it must be asserted in the name of the assured; in a court of equity or of admiralty or under some state codes, it may be asserted by the insurer in his own name."

Thus, it is quite evident that under the principles of these cases, neither the employer nor the insurance carrier as indemnitors is a proper legal party plaintiff, and at best can be only a use party plaintiff, if the principles of these cases were applicable to the present situation which involves a statutory cause of action for the wrongful death of another.

In the instant case, the question whether or not the Aetna Life Insurance Company has the equitable or beneficial ownership of the chose in action against the defendant has not been raised. The defendant merely objected that the Aetna Life Insurance Company was not a proper legal party plaintiff.

Under the *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co., supra,* and *Southern Railway Co.* v. *Blunt & Ward, supra,* both of which hold that at common law an insurance company as indemnitor is not a proper legal party plaintiff, and under *Glenn* v. *Marbury, supra,* which holds that at common law an assignee is not a proper legal party plaintiff, it is difficult to understand how the lower courts

erred in holding that the Aetna Life Insurance Company could not be joined as a legal party plaintiff.

The case of the Kokusai Kisen Kabushiki Kaisha, 44 Fed. (2d) 659, was correctly decided because in admiralty it has long been held that the equitable or beneficial owner of a chose in action or the assignee of a chose in action may sue in his own name. *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co., supra; The Propellor Monticello* v. *Mollison,* 17 Howard 153, 15 L. Ed. 68; *The Liberty No. 4,* 7 Fed. 226.

The case of *Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 32 L. Ed. 788, cited on p. 20 of the plaintiffs' brief accompanying their petition for a writ of certiorari, as further authority that the insurance company is a proper legal plaintiff, was likewise correctly decided because it, too, was in admiralty.

The decision in the case of *Travelers' Ins. Co.* v. *Great Lakes Engineering W. Co.,* 184 Fed. 426, is not inconsistent with that of the present case. In the first place, the court mentions the common law rule that the right of an insurance company for subrogation must be enforced in the name of the assured, but said that under the Ohio statute permitting a suit to be brought in the name of the real party in interest, the insurance company was a proper legal party plaintiff. Moreover, in that case, a "Lord Campbell's Act" was not involved, as the right of action subrogated to the plaintff Travelers' Insurance Company was an employer's common law right of action against his servant for negligence causing loss to the employer.

Even though the District of Columbia's Workmen's Compensation Act is a re-enactment of the Longshoremen's and Harbor Workers' Compensation Act, the former is, nevertheless, merely a local law applicable to the District of Columbia alone. It is quite possible for District of Columbia courts to reach results in regard to subrogation suits against third parties whose negligence or wrong-

doing has caused the death of a employee, which subrogation suits are brought by virtue of section 33 of the District of Columbia's Workmen's Compensation Act, different from results reached by either federal or state courts in other jurisdictions in regard to subrogation suits against third persons brought by virtue of section 33 of the Longshoremen's and Harbor Workers' Compensation Act, which section is exactly the same as section 33 of the District of Columbia's Workmen's Compensation Act. The "right of the person entitled to compensation" subrogated or assigned to the employer by section 33, and the manner of suing on the subrogation or assignment of this right in the District of Columbia by the employer or his assignee or indemnitor would be determined by District of Columbia law. The law of the forum governs as to whether an assignee may sue in his own name or in that of the assignor. *Glenn* v. *Marbury, supra; Pritchard* v. *Norton,* 106 U. S. 124, 130, 27 L. Ed. 104.

The instant case is an action at law in the District of Columbia, where rules of common law pleading are unchanged by statute insofar as this cause of action is concerned.

VI.

Who are the proper parties plaintiff?

The administratrix of the deceased employee is the only proper legal party plaintiff, and the employer may be the only proper use plaintiff. "Lord Campbell's Act" gives a cause of action for negligence causing death. It is the settled law of this jurisdiction that only the personal representative of the deceased may sue under this act. The Workmen's Compensation Act makes an assignment of either part or all of this statutory cause of action to the employer of the deceased employee, but fails to give him authority to bring the suit in his own name. Therefore,

the personal representative is the proper legal plaintiff, and the employer may be a proper use plaintiff. The other plaintiffs, Aetna Life Insurance Company and Anna Roberts in her own right, are neither proper legal nor proper use plaintiffs.

The case of *Luckey* v. *Union Pacific Railway Co.*, 117 Nebr. 85 (1928), 219 N. W. 802, is extremely pertinent on this point, and was decided under statutes very similar to those in this jurisdiction. In that case, the administrator of the deceased employee filed suit against the third person, the employer and the carrier of the employer, which carrier had become liable to pay compensation. The Nebraska "Lord Campbell's Act" provided that the action should "be brought by and in the name of his personal representative for the exclusive benefit of the widow or widower and next of kin."

The Nebraska Compensation Act provided (as quoted in the opinion):

> "Where a third person is liable to the employer or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation."

On appeal by the third person, the court held that such action must be brought in the name of the decendent's personal representative; that the Workmen's Compensation

Act did not create a new cause of action against a third person for negligently causing the death of another, nor authorized the widow of a deceased workman, nor the dependents, nor the administrator, nor the employer, to bring or prosecute such action. The court distinguished the situation where the employee was injured from the situation where the employee was killed, saying that in the former, the Compensation Act permitted the employer to bring suit in his own name against the third person.

In the light of the District of Columbia statutes involved, and the decisions cited herein, it is manifest that the lower courts reached a proper conclusion in holding that there was a misjoinder of parties plaintiff.

If any plaintiffs, legal or use, were improperly joined, the lower courts did not err in sustaining defendant's motion to strike out the declaration for misjoinder of plaintiffs.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

MERRITT U. HAYDEN,
SEFTON DARR,
H. CLAY ESPEY,
GEORGE MONK,
JAMES O'D. MORAN,
Attorneys for Respondent.

APPENDIX.

STATUTES.

The relevant portions of the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; made applicable to the District of Columbia by the Act of May 17, 1928, c. 612, 45 Stat. 600) are as follows:

Sec. 14 (33 U. S. C. 914) . . .

(m) Total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500.00.

Sec. 33 (33 U. S. C. 933). COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recoevred by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

The District of Columbia "Lord Campbell's Act" is as follows, Code D. C. 1924, c. 45 (D. C. Code, 1929, Title 21, c. 1, secs. 1-3):

Sec. 1301. LIABILITY.—Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, having entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars: *And provided further*, That no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

Sec. 1302. BY WHOM SUIT TO BE BROUGHT.—Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

Sec. 1303. DISTRIBUTION OF DAMAGES.—The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia.

The District of Columbia Code 1924, c. 11 (D. C. Code, 1929, Title 2, c. 1, secs. 1-4), provides as follows:

Sec. 431. JUDGMENTS.—A judgment or money decree may be assigned in writing, and upon the assignment thereof being filed in the clerk's office the assignee may maintain an action or sue out a scire facias or execution on said judgment in his own name, as the original plaintiff might have done.

Sec. 432. BONDS.—Any bond or obligation under seal for the payment of money may be assigned under the name and seal of

the obligee therein named, and the assignee may maintain an action thereon in his own name.

Sec. 433. NONNEGOTIABLE CONTRACTS.—All nonnegotiable written agreements for the payment of money, including nonnegotiable bills of exchange and promissory notes, or for the delivery of personal property, all open accounts, debts, and demands of a liquidated character, except claims against the United States or the salaries of public officers, may be assigned in writing, so as to vest in the assignee a right to sue for the same in his own name.

Sec. 434. GENERAL ASSIGNMENTS.—In case of a general assignment which shall include choses in action, it shall not be necessary to execute a separate assignment of each chose in action, but the assignee shall be entitled, by virtue of the general assignment, to sue in his own name on the several choses in action included therein.

SUPREME COURT OF THE UNITED STATES.

No. 137.—October Term, 1932.

Aetna Life Insurance Company, etc., et al., Petitioners, *vs.* Samuel D. Moses. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 9, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

Roberts, an employee of petitioner Bralove, was killed in the course of his employment, by the alleged negligence of respondent. His widow, who was also his administratrix, claimed and has accepted an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1924), made applicable as a workmen's compensation law in the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600. The award directed the employer and petitioner, The Aetna Life Insurance Company, his insurer,[1] to pay compensation to the widow in periodic installments, and the expenses attendant upon the burial of the deceased.

The present suit was brought in the Supreme Court of the District of Columbia on the theory that the acceptance of compensation awarded under the statute operated as an assignment of the administratrix's right to pursue the respondent for damages for the wrongful death, and that the insurer succeeded to that right by subrogation. The declaration named as plaintiffs petitioner, The Aetna Life Insurance Company "in its own right and also to the use of" the widow "in her own right and as administratrix" and

[1]Under the terms of the policy the insurer obligated itself to pay all installments of compensation directly to the person entitled to them "because of the obligation for compensation . . . imposed upon . . . this Employer", as well as to indemnify the employer against any loss by reason of his liability. The former provision is required by §§ 35 and 36 of the statute "in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated. . . ."

petitioner Bralove "to the use of" the insurance company. Respondent moved to strike the declaration for misjoinder of parties plaintiff and causes of action. The trial court sustained the motion on the first ground, and, as petitioners elected to stand on the declaration, gave judgment for the respondent, which the Court of Appeals affirmed, 57 F. (2d) 444. This Court granted certiorari. — U. S. —.

Both courts below ruled that the administratrix is, by the terms of the District death act (23 Stat. 307; D. C. Code [1924], §§ 1301, 1302, 1303), the only proper plaintiff in an action for wrongful death, and that the Compensation Act, though it assigns the cause of action for the death, to the employer, upon acceptance of the award, does not under the common law practice prevailing in the District, permit him to bring the suit in his own name. The trial court further expressed the view that the insurer was without any interest in the litigation, by way of subrogation, since the cause of action for wrongful death is not assignable at common law, and the Compensation Act confers on the insurer no rights analogous to those given the employer. The question before us is whether the Court of Appeals was right, and, if not, whether the proper parties have been designated as plaintiffs.

Sections 7, 8 and 9 of the Compensation Act provide for compensation to the employee if he is injured, or to certain of his dependents, if he is killed, in the course of his employment. Section 33 (a) provides that "if on account of a disability or death for which compensation is payable . . . the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect . . . to receive such compensation or to recover damages against such third person". By subsection (b) "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person", and by subsection (d) the "employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person".

But the cause of action against a third party which is thus cast upon the employer is not to be maintained exclusively for his own benefit. From the proceeds of the litigation or compromise the

employer is directed by § 33 (e) to retain an amount equal to his disbursements in securing them, the cost of benefits furnished by him to the employee, amounts paid as compensation, and the present value of all amounts which it is estimated are payable as such. The latter sum is to be held by the employer "as a trust fund to pay such compensation as it becomes due and to pay any sum in excess of such compensation to the person entitled to such compensation or to the representative". Any amount recovered above that required for these purposes is to be paid by the employer directly "to the person entitled to compensation or to the representative".

In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee, compare *Mercer* v. *Ott*, 78 W. Va. 629; *Fox* v. *Dallas Hotel Co.*, 111 Tex. 461, is thus avoided. Yet the employer is permitted to share in the recovery only to the extent of his own liability, compare *Travelers Insurance Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273, and any excess goes to the injured employee.

In this case the injury resulted in death of the employee, and the election to take compensation was made by the widow. As she is both the administratrix and the only person entitled to compensation, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances (compare §§ 33 [a] and 33 [b] with § 33 [f]). Her election has called into operation the statutory assignment so far as it applies to the action for wrongful death. We must decide its effect on that cause of action.

The statute is not free from ambiguity. The right to recover for a wrongful death is the creature, not of the common law, but of a statute which confers the right on the personal representative of the deceased for the benefit of his next of kin under the local statute of distribution, some of whom may not be entitled to compensation under the Compensation Act. Nevertheless, § 33 (b) of the Act provides that it is the "right of the person entitled to compensation to recover damages against such third person" which is assigned to the employer by the election to take compensation. Reading this provision literally and alone, the employer, in the

case of the wrongful death of his employee, would take nothing by the assignment which it purports to effect since the person entitled to the compensation has no right to recover for the death. But § 33 (d) authorizes the employer to institute suit or to compromise the claim, and §§ 33 (e) (1) (c) and 33 (e) (2) provide that any recovery in excess of the sums required to reimburse the employer and allow for compensation payable by him is to be paid to the representative of the deceased. Having regard to these provisions and to the general purpose which the act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former. For if it had been intended that the employer should assert only a part of the action for wrongful death, proportionate to the interest of those who are dependents under the Compensation Act, compare *Matter of Zirpola* v. *Casselman*, 237 N. Y. 367; *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 50, there would be no meaning to the language of § 33 (2) directing him to pay to the personal representative from the proceeds of the action any excess over the compensation award.

Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act, we do not think, as did the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative. It is true that the statute does not expressly say that the employer may bring the action in his own name and that by the common law the assignee must, in general, sue in the name of the assignor. *Glenn* v. *Marbury*, 145 U. S. 499. This rule, a vestige of the common law's reluctance to admit that a chose in action may be assigned, is today but a formality which has been widely abolished by legislation. We see no reason for thinking that a statute passed in 1928 and clearly intended to effect a complete transfer of the cause of action, should be interpreted to perpetuate that formality. There is nothing in its language, history or pur-

pose to indicate that the word "assignment" was used as anything other than a convenient description of the transfer to the employer of the rights of the employee or his representative, or that it is to be read in the common law sense, merely because the forum for the enforcement of those rights has not departed from the common law form in the case of voluntary assignments.

It is immaterial whether the statutory assignment is said to create a new cause of action in the employer or merely to permit him to enforce that previously vested in the employee or his personal representative. What is material is that the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name.

We do not doubt, although other courts have, *Henderson Tel. & Tel. Co.* v. *Owensboro Home Tel. & Tel. Co.*, 192 Ky. 322; *Hartford Accident & Indemnity Co.* v. *Englander*, 93 N. J. Eq. 188, that the insurer is subrogated to the rights of the employer to the extent that it has discharged his duties, though whether its rights extend to compensation which it is liable to pay, as well as to that which it has paid, we need not decide.[2] Notwithstanding, the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensation should be secured by insurance and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is a normal incident of indemnity insurance. *Hall & Long* v. *The Railroad Companies*, 13 Wall. 367; *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co*, 129 U. S. 397, 462; *St. Louis Iron Mountain & Southern Ry. Co.* v. *Commercial Union Insurance*

[2]The policy of insurance provides (Clause K) that "the Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates". The insurer is subrogated to the employer's rights to no greater extent under this express provision than it would be without it by operation of law; whether its rights may be limited by it, we have no occasion to consider.

Co., 139 U. S. 223, 235; *Travelers Insurance Co.* v. *Great Lakes Engineering Co.*, 184 Fed. 426; *Workmen's Compensation Exchange* v. *Chicago, M., St. P. & P. R. Co.*, 45 F. (2d) 885.

The suggestion of the trial court that subrogation is precluded here by the non-assignability, under the death act and the common law, of the administratrix's cause of action for death, is without force. Considerations of policy which may forbid the voluntary assignment of the cause of action are obviously inapplicable to a case where the statute does assign the action to the employer in order to carry out the plan of the Compensation Act. That plan would be destroyed if the insurance company were denied the right of subrogation. For the consequence would be to permit that double recovery by either the employer or the next of kin entitled to compensation which the statute is careful to avoid, with a resulting increase in the cost of the insurance which the statute requires.

The insurer's right of subrogation does not alter the fact that it is the employer who is directed by the statute to distribute the proceeds of the recovery, in which the insurer has only a partial interest. Accordingly, the employer is the party to bring the action and the only necessary party plaintiff in the case before us.[3] But the insurance company and the widow, both in her own right and as administratrix, are interested in the recovery. Under the common law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action

[3]Under the common law practice rights acquired by subrogation were asserted in an action at law in the name of the insured to the insurer's use, Hall & Long *v.* The Railroad Companies, 13 Wall. 367; United States *v.* American Tobacco Co., 166 U. S. 468, 474, though in equity, Garrison, et al. *v.* Memphis Ins. Co., 19 How. 312, and admiralty, Liverpool & Great Western Steam Co. *v.* Phenix Insurance Co., 129 U. S. 397, 462, the insurer might sue in its own name. We need not consider the effect upon the common law rule of Equity Rule 13 of the Supreme Court of the District of Columbia (made applicable to actions at law by Law Rules, ¶ 1) providing that all actions "shall be prosecuted in the name of the real party in interest," in a case where the insurer succeeds by subrogation to the entire cause of action of the insured against the party primarily responsible for the loss. Cf. Travelers Insurance Co. *v.* Great Lakes Engineering Co., 184 Fed. 426. Such was not the case here. Compare Norwich Insurance Co. *v.* Standard Oil Co., 59 Fed. 984; Continental Insurance Co. *v.* Loud & Sons Lumber Co., 93 Mich. 139; U. S. Fidelity & Guaranty Co. *v.* Graham & Norton Co., 254 N. Y. 50, 54-55.

to their use as well as to his own. See *Southern Ry.* v. *Carter,* 139 Ga. 236, 238; *Pearce* v. *Twichell,* 41 Miss. 344, 346; *Atkins* v. *Moore,* 82 Ill. 240, 241; compare *Roof* v. *Chattanooga Wood Split Pully Co.,* 36 Fla. 284, 293. Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have "an interest . . . in obtaining the relief demanded", we do not decide. The decision does not depend upon the federal statute, but upon the local rule, and may be conditioned by unwritten practices which we should hesitate to disturb. Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare *Hunt* v. *Bank Line,* 35 F. (2d) 136; or the insurer, see *Norwich Insurance Co.* v. *Standard Oil Co.,* 59 Fed. 984; *Continental Insurance Co.* v. *Loud & Sons Lumber Co.,* 93 Mich. 139; *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co., supra,* 54-55; compare *Ocean Accident & Guarantee Corp.* v. *Hooker Electrochemical Co.,* 240 N. Y. 37; *Aetna Casualty & Surety Co.* v. *Phoenix Nat. Bank & Trust Co.,* 285 U. S. 209, 214, in a case where the employer refused to cooperate in the prosecution of the action.

Since the ruling below that the action could only be brought in the name of the personal representative was erroneous, petitioners' failure to amend in conformity to that ruling will not preclude amendment now. Judgment will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.